(17)

No. 00-1249-CFX Title: Caren Cronk Thomas and Windy City Hemp Development Board, Petitioners
v.
Chicago Park District

Docketed:
February 1, 2001 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Feb 1 2001	Petition for writ of certiorari filed. (Response due March 3, 2001)
	Mar 5 2001	Brief of respondent Chicago Park District in opposition filed.
	Mar 20 2001	Reply brief of petitioners Caren Cronk Thomas and Windy City Hemp Development Board filed.
	Mar 21 2001	DISTRIBUTED for Conference of April 13, 2001
	May 8 2001	REDISTRIBUTED for Conference of May 24, 2001
	May 29 2001	Petition GRANTED. SET FOR ARGUMENT December 3, 2001. **********
	Jul 13 2001	Brief amicus curiae of Public Citizen, Inc. filed.
	Jul 13 2001	Joint appendix filed.
	Jul 13 2001	Brief of petitioners Caren Cronk Thomas and Windy City Hemp Development Board filed.
	Jul 25 2001	Brief amici curiae of Morality in the Media, et al. filed.
	Aug 9 2001	Order extending time to file brief of respondent on the merits until August 22, 2001.
	Aug 10 2001	Brief amicus curiae of City of New York filed.
	Aug 22 2001	Brief amicus curiae of United States filed.
	Aug 22 2001	Brief amicus curiae of International Municipal Lawyers Association filed.
	Aug 22 2001	Motion of International City-County Mgmt. Assn., et al. for leave to file a brief as amici curiae filed.
	Aug 22 2001	Brief of respondent Chicago Park District filed.
	Aug 22 2001	LODGING consisting of twenty bound copies of related material submitted by counsel for the respondent.
	Sep 6 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 20 2001	Application (01A265) for an extension of time to file petitioner's reply brief on the merits, submitted to Justice Stevens.
	Sep 21 2001	Application (01A265) granted by Justice Stevens extending the time to file until October 1, 2001.
	Sep 24 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Sep 24 2001	Motion of International City-County Mgmt. Assn., et al. for leave to file a brief as amici curiae DISTRIBUTED.
	Sep 26 2001	CIRCULATED.
	Oct 1 2001	Motion of International City-County Mgmt. Assn., et al. for leave to file a brief as amici curiae GRANTED.
	Oct 1 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

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Entry	Date	Proceedings and Orders
		argument GRANTED.
	Oct 1 2001	Reply brief of petitioners Caren Cronk Thomas and Windy City Hemp Development Board filed.
	Oct 16 2001	Record filed.
	Dec 3 2001	ARGUED.

(1) Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does immediate access to the courts following a denial of a permit for core political speech in a traditional public forum constitute prompt judicial review, as required by *Freedman v. Maryland*, without regard to the length of time allowed for a judicial decision?

II. Must an ordinance requiring a permit for core political speech in a traditional public forum include each of the procedural safeguards established in *Freedman v. Maryland*, or is that case only applicable to sexually explicit speech presented by adult entertainment businesses?

III. Is a content-neutral ordinance that requires a permit for core political speech in a traditional public forum analyzed as a prior restraint or under the more deferential standard applicable to time, place and manner regulations?

IV. May a plaintiff bring a facial challenge to a permit ordinance which restricts political speech in a public forum without first having to prove that the ordinance has been unconstitutionally applied to him because of the government's hostility to the plaintiff or his proposed speech?

V. Can an ordinance requiring a permit for core political speech in a traditional public forum include unfettered discretion to issue or withhold permits?

PARTIES TO THE PROCEEDING

The Petitioners, who were Appellants in the Seventh Circuit, are Caren Cronk Thomas and Windy City Hemp Development Board, an Illinois not-for-profit corporation. The original Plaintiff in the District Court was Robert MacDonald, who died while this case was on appeal to the Seventh Circuit. Thomas and the Board were allowed to substitute as parties after MacDonald's death.

The Respondent is the Chicago Park District, the Defendant in the District Court and the Appellee in the Circuit Court.

Except as stated above, all parties to the proceedings below are parties to this Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Counsel for the Petitioners informs this Court that Windy City Hemp Development Board has no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reported at 227 F.3d 921, is reproduced at Appendix A to this Petition. The Order of the Court of Appeals denying the Petition for Rehearing en banc is reproduced at Appendix B. The unreported opinion of the United States District Court for the Northern District of Illinois is reproduced at Appendix D.

JURISDICTION

The Court of Appeals entered its judgment on September 14, 2000. Petitioners timely filed a Petition for Rehearing en banc on September 28th. The Petition was denied on November 7, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . .

Statutory provisions

The Chicago Park District regulates the use of all parks in the City through a permit ordinance. The provisions of that Ordinance that are pertinent to this Petition are reproduced as Appendix F.

STATEMENT OF THE CASE

The Chicago Park District Ordinance requires that anyone planning to hold a political rally in any City park, involving more than 50 people or utilizing "amplified sound," must first obtain a permit from the Park District's General Superintendent.[1] App. F at 92a-93a. The ordinance lists several bases allowing the denial of a permit.[2] For example, an application can be denied if some Park District employee decides for some reason that the application is "incomplete."[3] An applicant can be denied if unspecified Park District officials, in a non-public procedure that involves undisclosed information from unknown sources, decide that an applicant, or some other unknown or unnamed person or persons, violated some term or condition of a prior permit.[4] A permit can be denied if, at a prior event held by the applicant under a permit, there was damage done to park property and the applicant has not paid for

1. *Amplified sound* is defined in Chapter VII, § A of the Ordinance as "any sound projected or transmitted by artificial means, including, but not limited to, loudspeakers, amplifiers, powered megaphones or any similar devices." App. F, at 91a.

2. Denial is discretionary. §§ 5(E) and 5(E)(5) state that the General Superintendent "may" deny a permit. Neither says "shall." There are no standards to limit the exercise of this discretion. App. F at 96a.

3. § 5(e), App. F at 97a. Joan Fencik, General Counsel for the Park District, testified before Magistrate Judge Keys that the Ordinance does not require the Park District to inform an applicant why the application was found to be "incomplete." Presumably, this means that only the person rejecting the application would know.

4. § 5(e), App. F at 97a. There is no restriction as to which permit provisions must have been violated. That is left to the unfettered discretion of the Park District.

the damage; this basis can be utilized even if the damage at the prior event was done by counter-demonstrators or others having no relationship with the applicant.[5] A permit can be denied if persons unconnected with the applicant remained in the park after a prior event.[6] There are no provisions for a hearing before or after a permit is denied.[7] The applicant is not entitled to know who made the allegations, nor see any evidence of the alleged violations. He is not even allowed to attend whatever meeting or conference is held (if any) at which the decision to deny a permit is made.

If the Park District finds a basis for denial, that finding can result in a lifetime prohibition against the applicant engaging in political speech in any City park, in the discretion of the General Superintendent.[8]

On March 5, 1997 Robert MacDonald applied for a permit to hold a political rally on the subject of drug law

5. § 5(e)(5), App. F at 97a. In a hearing before Magistrate Keys on May 6, 1997, Fencik testified that the Park District can deny a permit *regardless* of who damaged the park at a prior event.

6. Fencik testified to this construction of the Ordinance at the May 6th hearing.

7. "[T]here is no requirement of proof or adjudication to determine whether such misconduct has occurred; it appears that the mere belief of the Park District official that such misconduct occurred is enough to deny an application." App. C at 17a.

8. Fencik testified that the Park District construes the Ordinance as authorizing a lifetime ban.

reform.[9] The event was to be held in Grant Park. On March 12th MacDonald was notified that his permit application had been denied. The principal reason given for the denial was a determination by the Park District that he had violated the terms of two permits for a political rally in September of the previous year. MacDonald immediately filed an appeal, arguing that he had never committed any violations of the previous permit.[10] The appeal was denied. MacDonald filed an amended appeal. It also was denied.[11] In response, MacDonald filed suit in the District Court under 42 U.S.C. § 1983, arguing that the permit ordinance was an unlawful prior restraint on free speech.

Magistrate Judge Arlander Keys entered a preliminary injunction. The Park District appealed, and the Seventh Circuit vacated the injunction. *MacDonald v. Chicago Park District*, 132 F.3d 355 (7th Cir. 1997).

The parties engaged in limited discovery,[12] and on March 8, 1999 Magistrate Judge Keys filed his Report and Recommendation. App. D. He recommended a judgment

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9. It is difficult to imagine a more controversial subject, particularly in a City where the administration has taken a hard line position against the legalization of marijuana.

10. The "appeal" is a letter to the General Superintendent.

11. He did not get a permit for this rally, and even though he applied for several more before he died, he never received another one.

12. The discovery was to determine if the Park District had a well-established practice of constitutional construction and application of its ordinance. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992). The Park District refused to cooperate in the discovery, (as found by both Magistrate Judge Keys and District Judge Marovich) and provided no historical record of its past practice.

declaring much of the ordinance unconstitutional, and a permanent injunction. But on March 29th, United States District Judge George M. Marovich rejected the Report, upheld the ordinance in its entirety, and granted summary judgment for the Park District. App. E. MacDonald appealed to the Seventh Circuit.

On September 14, 2000 a panel of the Court of Appeals affirmed, finding the ordinance constitutional in all respects. App. A. The panel declined to utilize a prior restraint analysis, finding such an analysis "not helpful" in deciding what it called "novel cases."[13] App. A at 3a. The panel also said facial challenges to such ordinances would not "provide much assistance to judges." *Id.* The panel ignored this Court's many pronouncements on the value of core political speech, finding instead that it is entitled to less protection under the First Amendment than the sexually oriented speech typically presented in topless bars and adult bookstores. The panel held that the Park District did not bear the burden of initiating judicial review when it denied a permit,[14] and that the procedural safeguards mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965), and reaffirmed in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), only apply to ordinances expressly authorizing censorship.

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13. The panel never said why it found this case to be "novel."

14. Interestingly, the Seventh Circuit had previously held that whenever the Park District denies a free speech permit, it is required under *Freedman* to initiate judicial procedures. *Collin v. Chicago Park District*, 460 F.2d 756-57 (7th Cir. 1972). The Park District has apparently ignored that ruling for nearly 30 years.

Petitioners Caren Cronk Thomas and the Windy City Hemp Development Board filed a petition for rehearing en banc on September 28, 2000. On November 7th the Court denied the petition. App. B.

REASONS FOR GRANTING THE WRIT

This case is about the most precious aspect of the First Amendment: the right of citizens to speak out publicly on issues of political importance. The Petition involves each of the factors listed in this Court's Rule 10 that guide this Court's decisions on granting certiorari review. The decision below is in direct and irreconcilable conflict with decisions of other federal circuits,[15] and relevant decisions of this Court. Of equal importance, the Seventh Circuit has decided a significant question of federal law, arising under the Free Speech Clause of the First Amendment, that has not been settled by this Court, but that cries out for resolution.

It is of the utmost constitutional importance that this Court grant the Petition. The Petitioners' speech is the most important class of speech in our democratic republic.[16] This case is not about sexually explicit speech, that "falls only within the outer ambit of the First Amendment's protection." *Pap's*

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15. This Court recognized the conflict; *City News & Novelty, Inc. v. City of Waukesha*, No. 99-1680 (January 17, 2001).

16. In their concurring opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992), Justices Stevens, White and Blackmun wrote: "Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all."

A.M. v. City of Erie, 529 U.S. 277, ___, 120 S.Ct. 1382, 1391 (2000). At stake is the very life of the First Amendment's protection for core political speech in a traditional public forum. The First Amendment is concrete evidence of our "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But in the Seventh Circuit today, as a result of the opinion in this case, the right to free political speech in public parks is in extreme danger.[17] Yet, protecting political speech is why the First Amendment was added to our Constitution:

> The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

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17. Public parks, of course, are that public forum "held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

Connick v. Myers, 461 U.S. 138, 145 (1983).

Core political speech survives, in the face of government suppression, *only* because of First Amendment principles forged by this Court. Now, with an unusual hostility to those principles, the Seventh Circuit has decided that political speech is deserving of less protection than the sexually explicit speech described by this Court as at the "outer perimeters of the First Amendment." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

I. The Seventh Circuit opinion is in direct conflict with decisions of other circuit courts on the requirements of *Freedman v. Maryland*.

Of prime importance to this Court, in meeting its constitutional obligation to the lower courts, is the need to resolve a serious conflict among the circuits on an issue of significant importance: the requirement that a prior restraint of speech provide for prompt judicial review. The circuits are divided as to what "prompt judicial review" means. In its opinion dismissing the petition in *City News & Novelty, Inc. v. City of Waukesha*, 2001 WL 37653 at *2 (2001), the Court said: "We granted certiorari to resolve the conflict." That case is now gone; this case presents the Court with a perfect opportunity to finally resolve that conflict.

A. This Court must determine what constitutes prompt judicial review.

In 1965, this court decided *Freedman v. Maryland*, 380 U.S. 51 (1965). The case involved a statute that required movie exhibitors to submit every film to a review board to obtain a

license for showing the film in the state. The Court held that whenever the government imposes a prior restraint on free speech through a permit scheme, that scheme must contain three procedural safeguards. One of those safeguards requires prompt judicial review if a license is denied. 380 U.S. at 59. *See also, FW/PBS*, 493 U.S. at 228 ("there must be the possibility of prompt judicial review in the event that the license is erroneously denied.")

In *Freedman* the Court made it clear that the term "prompt judicial review" meant more than mere prompt access to the judicial system:

> Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan, supra*. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 59.

Prompt judicial review, so clearly defined in *Freedman*, is no longer required in the Seventh Circuit when the

government imposes a prior restraint on core political speech.[18] As several of the circuits, including the panel in this case, and this Court in *City News & Novelty, Inc. v. City of Waukesha*, 2001 WL 37653 (January 17, 2001), have pointed out, there is a serious split among the circuits as to just what that phrase means after *FW/PBS*. That split must be resolved by this Court.

The conflict began when the Seventh Circuit decided *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied*, 511 U.S. 1085 (1994). In *Graff*, five judges said that a permitting ordinance that allows prompt access to the courts is all the First Amendment and *Freedman* require. However, five judges disagreed, and two judges expressed no opinion. Therefore, there was no holding on this point.[19]

The *Graff* plurality opinion quickly came under fire. When a county in Maryland argued to the Fourth Circuit that under *Graff* prompt judicial access was sufficient, the Court strongly rejected that claim and held that a prompt judicial determination was required. *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 994 (4th Cir. 1995)(en banc), *cert. denied*, 516 U.S. 1010 (1995). In *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.

18. It would appear that under the panel decision, prompt judicial review is required when the government imposes a restriction on topless dancing.

19. This did not prevent a panel in a later Seventh Circuit case to say: "The opportunity to apply for that writ [of common-law certiorari] is enough, *we have held*, even when rights under the first amendment are at stake. *Graff v. Chicago*, 9 F.3d 1309, 1323-25 (7th Cir. 1993)(en banc)." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994)(emphasis added). That panel consisted of Judge Manion, the author of the plurality in *Graff*, Judge Easterbrook, also in the *Graff* plurality and a judge in this case, and a district court judge.

1995), the Sixth Circuit also rejected the argument that mere access to judicial review satisfies the *Freedman* prompt judicial review requirement. While observing that "the Supreme Court has not expressly defined prompt judicial review," the Court said that even if access were immediate, "a permit applicant would still have to wait three to five months for judicial review." *Id.* at 225. The court held that this delay did not constitute prompt judicial review.

The Ninth Circuit added its voice in *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998):

> We reject the view of the Fifth and Seventh Circuits that mere access to judicial review is sufficient. As the Seventh Circuit acknowledged in *Graff*, "[a] person always has a judicial forum when his speech is allegedly infringed." *Graff*, 9 F.3d at 1324. Thus, to hold that mere access to judicial review fulfills the second *Freedman* safeguard makes the safeguard itself meaningless. We conclude that "prompt judicial review" means the opportunity for a prompt hearing and a prompt decision by a judicial officer.

Joining the Seventh Circuit in holding that prompt access is all the First Amendment requires are the First and Fifth Circuits. The First Circuit, in *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993), upheld a provision in an ordinance requiring prior authorization for solicitation in certain public areas. Interestingly, and without much discussion, the court said the ordinance complied with *Freedman*'s prompt judicial review requirement because it allowed a prompt *administrative* appeal

following denial of an authorization request. *Id.* at 1327. There were no time limits for a decision by the administrative hearing officer. Nevertheless, that did not convince the First Circuit that the prior restraint imposed on protected speech was unconstitutional.

In *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) the court held that prompt judicial access is all that is required under *Freedman* and *FW/PBS*, with this interesting statement:

> Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A "brief period" within which all judicial avenues are exhausted would be an oxymoron.

Of interest are several decisions of the Second and Eleventh Circuits on this same point. In *Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999), a panel held that if an ordinance requiring a permit to engage in political speech in a public park allowed prompt judicial access to the courts, a common-law certiorari proceeding would satisfy *Freedman*. But a second panel opinion, authored by one of the judges from the first panel, said that New York's common-law certiorari procedure may not meet the prompt judicial review requirement if it does not mandate a prompt judicial decision. *MacDonald v. Safir*, 206 F.3d 184, 195 (2nd Cir. 2000). It appears, then, that in the

Second Circuit prompt access to a court *and* a guarantee of a prompt judicial decision is required.

Equally interesting are three decisions in the Eleventh Circuit. In *Redner v. Dean*, 29 F.3d 1495, 1500-01 (11th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995), the court struck an adult entertainment business licensing ordinance because it did not contain the required *Freedman* safeguards. Some circuit courts read the *Redner* opinion as rejecting the "prompt judicial access" position. *East Brooks Books*, 48 F.3d at 225; *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999).

But the issue remains unclear in the Eleventh Circuit. In *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1255 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000), the court discussed the conflict:

> The First, Fifth and Seventh Circuits hold that for licensing ordinances, prompt judicial review only means access to prompt judicial review. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994), followed in *Grand Brittain, Inc. v. City of Amarilio*, 27 F.3d 1068, 1070-71 (5th Cir. 1994) (per curiam); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). On the other side are the Fourth and Ninth Circuits and arguably the Sixth, which hold that *Freedman* and *FW/PBS* require a guarantee of prompt judicial resolution. *See Baby*

> *Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir.1998), followed in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 998- 1001 (4th Cir. 1995) (en banc); *cf. East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir. 1995) (state certiorari procedures an insufficient guarantee of prompt judicial review).

The court said that for adult entertainment business licensing ordinances, prompt access is sufficient:

> [W]e agree with the First, Fifth and Seventh Circuits and hold that access to prompt judicial review is sufficient *for adult entertainment licensing ordinances.*

187 F.3d at 1256-57 (emphasis added).

The court later clarified its holding in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), a core political speech case:[20]

> [O]ur distinction, in this instance, rests not on the semantics of a given statute, but on the inherent differences between the facts of this case and cases involving business licensing statutes such as those in *FW/PBS* and *Boss Capital*.

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20. Circuit Judge Dubina authored the opinions in *Boss Capital* and *Cannabis Action Network*.

231 F. 3d at 775.[21]

In *Cannabis Action Network* the City argued that even in a core political speech case, prompt judicial access was sufficient. But the Court declined to decide the question:

> [W]e limited ourselves in *Boss Capital* to the specific facts before us and decline to answer the unposed question of whether *Freedman's* requirement of "prompt judicial review" demanded explicit provision for prompt judicial determination in challenges not involving business licensing schemes. *See id.* at 1256-57. For the reasons explained below, we need not answer that difficult question today.

231 F.3d at 774.

The division among the circuits was expressly recognized by the panel in this case. App. A at 11a (citations omitted). No one can disagree with Petitioners' claim that this issue has so divided the circuits that there is no consistent principle of law applicable to the fifty states.[22] Citizens in some

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21. This is a distinction the Seventh Circuit panel refused to make.

22. Page limitations prevent a discussion of how the conflict has affected the district courts, particularly those in circuits where the circuit court has not ruled on the issue. One can compare *Books, Inc. v. Pottawattamie County*, 978 F. Supp. 1247 (S.D. Iowa 1997), a court in the Eighth Circuit, holding that prompt judicial access is sufficient, with *Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233 (D. Wyoming 1997), a court in the Tenth Circuit, holding that only a guarantee of a prompt judicial

(continued...)

states have greater constitutional protection for their right to free speech (of all types) than citizens of other states. The circuit courts are divided; the district courts are divided; and the situation cries out for resolution by this Court.[23] As Judge Ripple wrote in his concurring opinion in *Graff*, discussing prompt judicial review:

> The eyes of the bench and bar, and certainly those of the Justices of the Supreme Court of the United States who will undoubtedly be asked to review our work, are a fragile national resource. Under the unique circumstances presented here, however, an addition to the dialogue is justified because this case presents a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States . . . .

Graff v. City of Chicago, 9 F.3d at 1333 (Ripple, J., concurring).

(...continued)
decision will satisfy *Freedman*. Both of those cases involved adult business licensing ordinances.

23. The panel opinion in this case says that the Eleventh Circuit has *held* that "for licensing ordinances, prompt judicial review only means access to prompt judicial review." But as we see in *Cannabis Action Network*, the Eleventh Circuit takes that position only for sexually oriented business licensing ordinances. This merely highlights Petitioners' claim that the conflict among the circuits grows worse by the decision, and must be settled by this Court.

B. The Court must also determine who bears the burden to seek judicial review.

There is also a conflict between the Seventh and Eleventh Circuits on who must initiate judicial review. The panel in this case said it is the unsuccessful permit applicant who must seek judicial review:

> If a person denied a permit for reasons that he believes violate the First Amendment is dissatisfied with a paper record reviewed in state court by means of common law certiorari, he has only to bring a suit in federal district court and if the matter is urgent to seek as these plaintiffs' predecessor (the deceased MacDonald) did a preliminary injunction.

App. A at 10a.

But in the recent decision in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761, 776 (11th Cir. 2000) the Eleventh Circuit disagreed:

> In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum . . . The right to speak sought by CAN in this instance deserves greater protection than that outlined by the plurality in *FW/PBS*. Accordingly, we decline to relieve the City of the requirement that its Street Closing Ordinance meet *Freedman*'s first procedural safeguard.

This, then, becomes another conflict to resolve, adding to the importance of granting this Petition for Certiorari.

II. The panel has decided important federal questions in a way that directly conflicts with relevant decisions of this Court.

The Seventh Circuit panel issued several somewhat remarkable pronouncements in this case. In at least two respects, the panel declined to follow precedent from this Court. The panel determined that a permit scheme restricting core political speech in a traditional public forum is not analyzed as a prior restraint but as a time, place and manner restriction. App. A at 11a. And the panel directed district courts not to consider a facial challenge to such a permit ordinance unless the applicant can prove he was denied a permit because of government hostility to him or his speech. *Id.*

A. A permit scheme restricting core political speech in a public forum must be analyzed as a prior restraint.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) this Court reviewed a licensing ordinance applicable to "sexually oriented businesses." The Court of Appeals for the Fifth Circuit had found the ordinance valid after applying a time, place and manner analysis. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). In so doing the Fifth Circuit rejected the appellants' claim that the ordinance must include the procedural safeguards from *Freedman v. Maryland*.

This Court granted review. Justice O'Connor, in a plurality opinion, wrote:

> We granted certiorari on the issue whether the licensing scheme is an unconstitutional prior restraint that fails to provide adequate procedural safeguards as required by *Freedman v. Maryland*, 380 U.S. 51 (1965) . . . Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses. Cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975).

493 U.S. at 222-23.

Justices Stevens and Kennedy joined the plurality. Justices Brennan, Marshall and Blackmun, in a concurring opinion, left no doubt that the ordinance was to be analyzed as a prior restraint. Therefore, six justices of this Court concluded that Dallas' *content-neutral* licensing regulation, requiring a business to obtain city permission before engaging in free speech, was a prior restraint.

Professing "confusion" about the decision in *FW/PBS*,[24] and finding a prior restraint analysis "not helpful" (App. A at 3a), the Seventh Circuit has now decided that a "content-neutral" ordinance restricting political speech is not a prior

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24. *Graff*, 9 F.3d at 1334-35 (7th Cir. 1993)(plurality opinion).

restraint. The panel did exactly what the Fifth Circuit had done in *FW/PBS*: it considered the ordinance as a time, place and manner regulation.

The difference between a prior restraint and a time, place and manner restriction is of great constitutional significance. A prior restraint comes to the reviewing court "bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558. The government bears a heavy burden to demonstrate that a prior restraint meets the requirements of the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *New York Times Co. v. United States*, 403 U.S. 713 (1971). A time, place and manner ordinance, like most laws, is presumed valid, and one who challenges it bears the burden of demonstrating its invalidity. A prior restraint restricting political speech must include each procedural safeguard in *Freedman*. A time, place and manner restriction need not.

It is clear that if the courts are allowed to disregard this Court's requirement that a prior restraint analysis be applied to permit ordinances restricting political speech, the burden on the unsuccessful permit applicant has been greatly increased, and his ability to demonstrate the invalidity of the ordinance has been greatly diminished.

B. A plaintiff must be allowed to facially challenge a permit scheme restricting core political speech in a public forum.

Core political speech survives, in the face of constant governmental attempts to suppress it, *only* because of this Court's vigilance and the First Amendment principles forged by this Court over decades. Now, with an unusual and

inexplicable hostility to those principles, the Seventh Circuit has placed numerous and potentially insurmountable hurdles before a political speaker denied the right to speak in a public forum. Not the least of these is the panel's strong suggestion that facial challenges are merely semantic nit-picking, and that speakers should not be granted relief unless they demonstrate that permit denials have been motivated by government hostility to the applicant or his message. In so holding, the Seventh Circuit refused to follow this Court's mandate in *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750 (1988).

As this Court recognized, there are several reasons behind allowing a facial challenge to governmental impediments to the exercise of political speech. They include the fact that the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech. *City of Lakewood*, 486 US at 757. It has been clear ever since *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), that "[p]roof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." Yet, the Seventh Circuit panel has now turned the clock back more than six decades, by requiring proof of the censor's abuse of power before one can attack the legitimacy of that power.

Perhaps more importantly, where a governmental agency has been given carte blanche authority to issue or refrain from issuing permits, the lack of standards for such action makes it difficult to distinguish between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power:

> Standards provide the guideposts that check the licensor and allow courts to

> determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."

Lakewood, 486 U.S. at 758.

The panel decision now forces those wishing to speak out on political issues to prove that which this Court has recognized is not subject to proof, *i.e.*, that the permit was denied because of hostility to the content of the speech. This is another instance of the panel's rejection of long standing First Amendment requirements which this Court has settled long ago.

C. The panel decision approving a prior restraint with unfettered discretion is in direct conflict with numerous decisions of this Court, including *FW/PBS, Inc. v. City of Dallas*.

In two Reports and Recommendations, Magistrate Judge Keys meticulously detailed numerous sections of the Ordinance that clearly contain unlawful discretion. App. C; App. D. He recommended that §§ C.4(c), (d) and (f), and §§ C.5(e) and C.6(c) be found unconstitutional for that reason alone. App. D at 60a-72a. He found that the Ordinance "gives the Park District substantial power (whether or not exercised) to censor based on the content or viewpoint of speech: discretion to deny permit applications; discretion as to the fees and expenses

imposed on permittees; and discretion as to the time taken to process an application." App. D. at 33a.

District Judge Marovich, relying only on the opinion in *Graff*, rejected Judge Keys' recommendation and, instead, found no unlawful discretion in the ordinance. App. E at 89a. The Seventh Circuit panel ignored the issue. App. A at 5a-7a.

One need look no further than this Court's opinion in *FW/PBS* to understand that the district court and the Seventh Circuit panel ignored this Court's binding precedent on this issue:

> [A] scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publishing* Co., 486 U.S. 750, 757 (1988). *See Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. Birmingham, supra*; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). " 'It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' "

> *Shuttlesworth, supra*, 394 U.S., at 151 (*quoting Staub, supra*, 355 U.S., at 322).

493 U.S. at 225-26.

None of the "criteria" found in the Park District Ordinance contain any semblance of the specificity required by decades of this Court's jurisprudence. The litany of reasons set forth in the ordinance for denial of a permit allows any request for a permit to be denied. But the defect is more severe. It is made constitutionally intolerable by the provision which states that even though one or more of the reasons for denying a permit exist, the Park District *may*, without giving any reasons, grant the permit anyway. There is no constraint upon the Park District's freedom to deny any permit application *based on the message of the speaker!* Whether the parks may be used for political speech is dependent solely upon the whim of politically appointed officials. Only by ignoring this Court's clear precedent of over half a century can such a procedure be countenanced.

The panel opinion is in stark contrast to this Court's requirements for clear, objective standards whenever a prior restraint is imposed on the right to free speech. This Ordinance is simply a longer version of the parade ordinance condemned in *Shuttlesworth*. This Court must grant review to correct the Seventh Circuit's misreading of numerous decisions of this Court on this point.

CONCLUSION

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

> essential to the security of the Republic, is a fundamental principle of our constitutional system.
> *Stromberg v. California*, 283 U.S. 359, 369 (1931).

In the Seventh Circuit, core political speech – expression on public issues – no longer occupies the highest rung of First Amendment values. Incredibly, the Seventh Circuit has now decreed that core political speech – described by this Court as "the essence of self-government" – is to receive less protection from potential government censorship than sexually explicit speech in adult entertainment businesses.[25] Permit schemes for political speech in public parks are no longer prior restraints, and need not include *Freedman*'s procedural safeguards. Public parks are not to be "used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"[26] but are primarily for recreation. An unsuccessful applicant for a permit to engage in free speech must bear the burden of initiating judicial review, and bear the burden in court.[27] Unsuccessful permit applicants must prove that a permit was denied because of government

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25. The panel described core political speech as "political and ideological agitation." App. A at 4a.

26. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

27. There is little difference between a citizen denied a permit for political speech and a movie exhibitor denied a permit to show a film. "[I]t may prove too burdensome to seek review . . . " of the denial. *Freedman*, 380 U.S. at 59. The speaker may well be deterred from engaging in "a protracted and onerous course of litigation." *Id.* Denial of the permit "may have a discouraging effect" on the political speaker. *Id.* But there is one critical distinction: the value of the speech. The panel decided that sexually explicit speech deserves more protection. This Court has consistently said that core political speech is afforded the highest degree of protection.

hostility to them or their proposed speech. First Amendment values have been turned upside down.

Petitioners cannot state their case in strong enough terms. Core political speech is in serious danger. Permitting authorities are now, for all practical purposes, the final arbiters of who will speak in a public park and who will not, since prompt judicial review of the denial of a permit is no longer guaranteed. Unless this Court acts, speakers with views disfavored by the government will be silenced, and only those with a viewpoint winning government approval will have use of our parks to advance their political beliefs.

This Petition for Certiorari must be granted to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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APPENDICES

In the

United States Court of Appeals

for the Seventh Circuit

No. 99-1811

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Plaintiffs-Appellants,

v.

CHICAGO PARK DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2963—George M. Marovich, *Judge.*

Argued April 19, 2000—Decided September 14, 2000

Before POSNER, COFFEY and EASTERBROOK, *Circuit Judges.*

POSNER, *Circuit Judge.* Among the regulations of

the Chicago Park District governing the use of its parks is one requiring that a permit be obtained for an assembly, parade, demonstration, sporting event, or other use of the park by a group of 50 or more persons. Chi. Park Dist. Code ch. VII § C. The regulation spells out the criteria for the grant of such a permit, and the procedures for obtaining it and for challenging its denial, in considerable detail. The plaintiffs, who want to use the park for rallies in favor of repealing the laws criminalizing the sale of marijuana, claim that the regulation violates the free-speech clause of the First Amendment "on its face," that is, without regard to whether the regulation has been applied in such a way as to infringe the right of free speech. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 129-30 (1992); *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 755-59 (1988); *North Avenue Novelties, Inc. v. City of Chicago,* 88 F.3d 441, 444 (7th Cir. 1996). "Challenges to statutes as written, without inquiring into their application, are appropriate when details of implementation are inconsequential (usually because nothing could be done in the course of application to save the law) or when the laws are so overbroad that the risk of improper application leads persons to withdraw from the borderland. Fear of penalty, leading to a reduction in speech, supports the doctrine that a person whose speech lawfully could be regulated may challenge a statute achieving regulation in an improper way, or to an excessive extent." *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge,* 9 F.3d 1290, 1291-92 (7th Cir. 1993). The plaintiffs claim that because a regulation that requires permission to hold a political rally in a "public forum" (as the Chicago Park District's parks are conceded to be) imposes a "prior restraint" on the exercise of free speech, it must, to pass constitutional muster, be free of any

element of vagueness or uncertainty that might enable the regulation to be enforced in such a way as to deter or impede the exercise of this most celebrated of constitutional rights.

We do not find this a helpful formula. The historical referent of "prior restraints" is censorship, see 4 William Blackstone, *Commentaries on the Laws of England* 151-53 (1769), which the administration of a park system does not much resemble. The statement in the plaintiffs' brief that "denial of a permit to hold a rally is the ultimate censorship" is hollow rhetoric. It is a censor's business to make a judgment about the propriety of the content or message of the proposed expressive activity. Because he is in the business of suppressing such activity (friends of free speech are not drawn to a career in censorship), the danger of abuse is very great, especially when assessed in light of the dismal history of censorship. The regulation challenged here does not authorize any judgment about the content of any speeches or other expressive activity—their dangerousness, offensiveness, immorality, and so forth. It is not even clear that the regulation reduces the amount of speech. A park is a limited space, and to allow unregulated access to all corners could easily reduce rather than enlarge the park's utility as a forum for speech. See *Cox v.* New *Hampshire,* 312 U.S. 569, 574-76 (1941); cf. *Beal v. Stern,* 184 F.3d 117, 128-29 (2d Cir. 1999). Just imagine two rallies held at the same time in the same park area using public-address systems that drowned out each other's speakers. Cf. *Ward v. Rock Against Racism,* 491 U.S. 781 (1989). The heterogeneity of the practices that the "prior restraints" formula covers (with the present case compare *Freedman v. Maryland,* 380 U.S. 51 (1965), involving a movie censorship board)

is reason to doubt that it can provide much assistance to judges who have to decide a novel case.

The problem is general. General language, the language in which legal principles are couched, tends not to help much in the decision of cases in which weighty interests are on both sides of the balance that the court is asked to strike. Thus in this case there is, on the one hand, a danger in giving officials broad discretion over which political rallies shall be permitted to be conducted on public property, because they will be tempted to exercise that discretion in favor of their political friends and against their political enemies—and the advocates of legalizing the sale of marijuana and other controlled substances have very few political friends. But, on the other hand, a permit requirement is a sine qua non of managing a park system in a way that will preserve the value of the parks for the general public. Parks are primarily for recreation rather than for political and ideological agitation. They cannot be preserved in the primary use for which they are intended if any group can hold a rally of any size and length at any time with amplified sound of any volume. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 296 (1984). Indeed, as we noted earlier, without regulation even the agitators might not be able to get their message across.

The competing interests cannot be weighed in the abstract in other than the grossest sense, and so a "correct" balance cannot be struck. This must give pause to any court minded to strike down a permit regulation on its face and so without consideration of its application to a particular event for which a permit was denied. A challenge to the wording as distinct from the actual

application of a regulation invites semantic nit-picking and judicial usurpation of the legislative drafting function in an effort to avert, without creating loopholes, dangers at best hypothetical and at worst chimerical. The problem is well illustrated by this case as we consider the plaintiffs' objections to the regulation, all of which the district court rejected en route to granting judgment for the park district after another panel of this court reversed the grant of a preliminary injunction. *MacDonald v. Chicago Park District,* 132 F.3d 355 (7th Cir. 1997).

The regulation authorizes the denial of a permit on a variety of grounds none of which has anything to do with the content of expressive activity. Chi. Park Dist. Code ch. VII § C5(e). One is that the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of any event or activity previously permitted." The plaintiffs contend that the word "material" is excessively vague. The contention is frivolous. The word is one of the elemental legal terms, and is considered quite definite enough to form the keystone of criminal prohibitions against fraud. The residual vagueness that it shares with most words could be eliminated only by eliminating it from the regulation, but that would make the regulation more rather than less restrictive. The plaintiffs say that "misrepresentation" is vague too, and would prefer "falsehood." They have not suggested a substitute for "material" and so in effect they want us to rewrite the regulation so that it authorizes denying a permit to anyone who has told the park district a fib. All that their contention regarding the vagueness of "material misrepresentation" shows is the limits of language and so the inherent limitations of "facial" challenges.

They complain that the grounds for denial of a permit are permissive. The park district "may" deny a permit because of a misrepresentation, the failure to tender the fee, having damaged property of the park district on a previous occasion, or other grounds listed in the regulation, but it is not required to; it can forgive. The plaintiffs argue that this power of mercy arms the park district to pick and choose among applicants on political grounds. It indeed creates such a danger; but if this discretionary feature of the regulation were excised, the regulation would be more restrictive than it is (just as it would be if "falsehood" were substituted for "material misrepresentation"). This is another example of how free speech is so often on both sides of the balance in cases of the regulation as distinct from the prohibition of speech, a consideration that should make courts hesitant to invalidate such regulations. An even clearer example is a provision of the ordinance waiving the required permit fee for events protected by the First Amendment. The plaintiffs complain that this is vague, but do not indicate how it could be made less vague yet encompass the myriad activities that the First Amendment has been held to protect. Curtailing speech is an odd way of protecting speech.

The regulation requires applicants for permits to obtain liability insurance in the amount of $1 million to indemnify the park district against liability arising from a rally that might degenerate into a riot. (That is the amount of the policy, not the premium, which for the type of event envisaged by the plaintiffs would not exceed $1,200.) The plaintiffs argue ingeniously that since violence to person or property incidental to a political rally is likely to arise from the unpopularity of the cause

espoused by the rally's sponsors or speakers, the requirement of buying insurance amounts to a "heckler's veto," which the cases hold is not a proper basis for restricting free speech. *Forsyth County v. Nationalist Movement, supra,* 505 U.S. at 134-35; *Terminiello v. Chicago,* 337 U.S. 1, 4-5 (1949); *Cox v. Louisiana,* 379 U.S. 536, 551-52 (1965); *Chicago Acorn v. Metropolitan Pier & Exposition Authority,* 150 F.3d 695, 701 (7th Cir. 1998). But the amount of insurance required is not based on, or, so far as has been shown, influenced by, the nature of the event, and specifically by whether it involves controversial expressive activity likely to incite violence by onlookers or opponents. The required amount and the cost of the insurance depend only on the size of the event and the nature of the facilities involved in it (a bandstand, stage, tents, and so forth).

The park district requires that applications for permits be filed 30 days in advance – 60 days if special facilities are to be involved, such as sound amplification, which unless limited can violate the city's noise ordinance. The plaintiffs argue that these periods are too long and inhibit rallies responding to fresh news and startling events. But since thousands of permit applications are filed with the park district every year, it would be burdensome to require the park to process the applications in a significantly shorter time. The park district's policy, moreover, is to allow "spontaneous" rallies in reaction to current events. The opportunities for abuse are manifest but are minimized by the fact that if there is abuse the victims can bring a judicial challenge to the permit regulation as applied to them.

The plaintiffs reserve their strongest objection for

the regulation's failure to provide for searching judicial review of permit denials. They also complain about the absence of any deadline for the completion of such judicial review as the law affords them, not noticing the tension with their desire that the review be penetrating and meticulous – which takes time. In *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (en banc), the full court confronted the same issues of the adequacy and timing of judicial review in the context of an ordinance regulating newsstands on the city's sidewalks. The court was badly fractured, but counting noses one discovers that a majority believed that the judicial review procedure was good enough for a regulation of expressive activity when the regulation is not a form of censorship, that is, does not require or permit the regulatory authority to evaluate the content or message of the activity regulated. *Id.* at 1324-25 (plurality opinion), 1330-33 (concurring opinion). This regulation does not.

Review of agency action in Illinois is governed by an administrative procedure act (similar to the federal act, *International College of Surgeons v. City of Chicago,* 153 F.3d 356, 364 (7th Cir. 1998)) – but only if the statute creating the agency so provides. 735 ILCS *5/3-104.* If it does not so provide, and it does not with respect to the park district's denial of permit applications, the agency's action is reviewable only by means of a proceeding for common law certiorari. But this turns out to be a distinction without a difference. The proceeding is instituted in the same state court that would review the action under the administrative procedure act, *Smith v. Department of Public Aid,* 367 N.E.2d 1286, 1293 (1977), and although the standard of review is stated in different words from those used in that act, it amounts to the usual

substantial-evidence review that is familiar from administrative law. The reviewing court does not take evidence but relies on the record compiled in the administrative proceeding and seeks only to determine whether the agency's legal conclusions are correct and the agency's factual conclusions supported by substantial evidence, e.g., *Norton v. Nicholson,* 543 N.E.2d 1053, 1059 (III. 1989), or in other words not clearly erroneous. The review process is thus the same as under the state's administrative procedure act – as indeed the Supreme Court of Illinois stated in *Hanrahan v. Williams,* 673 N.E.2d 251, 253-54 (111. 1996).

The plaintiffs argue that the park district should in every case in which it denies a permit be required to seek judicial review *of its own action.* The argument is based on a misreading of *Freedman v. Maryland, supra,* 380 U.S. at 58-59, which holds only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems. The Supreme Court made that clear in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 228-230 (1990) (plurality opinion), *id.* at 244 (concurring opinion), *id.* at 249 (concurring and dissenting opinion).

But their principal complaint about the judicial-review procedure we've outlined, other than the lack of a deadline for the court's decision, is that there is no provision for an oral hearing. An applicant denied a permit can appeal the denial to the park district's superintendent, and submit any documents he wants, and the district must give written reasons for its action. But all submissions are in writing and therefore, the plaintiffs argue, the record compiled before the park district is

insufficient to enable meaningful judicial review of the superintendent's action. The argument is defeated by the plaintiffs' own emphasis on the importance of expedition. The regulation requires the park district to act on a permit application within 28 days and an appeal from the denial of such an application to be decided by the superintendent within 7 days. These deadlines are too tight to permit an evidentiary hearing with oral testimony, cross-examination, and the other accouterments of a trial. The plaintiffs have to choose between orality and expedition; they refuse to do so.

The entire emphasis on judicial review and evidentiary hearings is misplaced. If a person denied a permit for reasons that he believes violate the First Amendment is dissatisfied with a paper record reviewed in state court by means of common law certiorari, he has only to bring a suit in federal district court and if the matter is urgent to seek as these plaintiffs' predecessor (the deceased MacDonald) did a preliminary injunction. See *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Van Harken v. City of Chicago*, 103 F.3d 1346 (7th Cir. 1997); *Hameetman v. City of Chicago*, 776 F.2d 636 (7th Cir. 1985). Given that the plaintiffs have two remedies, one in state court and the other in federal court, the possible inadequacies of the state remedy, inadequacies in any event balanced by the expedition that barring oral testimony permits, are trivial.

The plaintiffs fear that the required expedition at the administrative level will be undone by foot dragging at the state court level, since there is no deadline on when the state court must render its decision in a common law certiorari proceeding. It is of course unusual though not

unknown to impose a time limit on judges, the fear being that it will both disrupt the orderly management of a judicial docket and conduce to hasty decision making. Since 42 U.S.C. § 1983, the statute under which federal constitutional claims are litigated in the federal courts, does not impose any requirement (with immaterial exceptions) of exhausting state judicial remedies, the victim of foot dragging in state court can always bring a parallel suit in federal court, complaining that the delay is denying him an adequate remedy for the violation of his constitutional rights.

Although a number of cases hold that judicial review of the denial of a permit must indeed be "deadlined," *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir. 1995) (en banc); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995); *Redner v. Dean*, 29 F.3d 1495, 1501-02 (11th Cir. 1994); contra, *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870, 881-82 (Wis. App. 1999), *cert. granted*, 120 S.Ct. 2687 (2000); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 707-09 (5th Cir. 1994), they all involve special licensing regimes for sexually oriented businesses. They are based on Supreme Court cases involving censorship, such as the *Freedman* case cited earlier, or quasi-censorship, such as the ordinance at issue in *FW/PBS, Inc. v. City of Dallas, supra*, which required the licensing of such businesses. The government's evident concern with the content of the "speech" disseminated by such businesses argues for greater judicial vigilance than in time, place, and manner cases, in which our rejection of deadlining in *Graff*, 9 F.3d at 1324-25, stands uncontradicted. Cf. *Jews for Jesus, Inc.*

v. Massachusetts Bay Transportation Authority, 984 F.2d 1319, 1327 (1st Cir. 1993). Realism required recognition of the danger that state courts might drag their heels in deciding appeals by sexually oriented businesses from denials of licenses. The permit requirement at issue here is far more general and so far as appears the permits that are denied do not relate to controversial or unpopular expression. Especially in the absence of any showing, which has not been attempted, that the Chicago Park District is trying to restrict the expression of unpopular ideas or that the state courts are not acting with reasonable promptitude on appeals from permit denials, a more relaxed attitude toward the pace of judicial review is warranted than in the case of regulation targeted at unpopular expression. Cf. *Ward v. Rock Against Racism, supra,* 491 U.S. at 795; *Stokes v. City of Madison,* 930 F.2d 1163, 1170 (7th Cir. 1991); *MacDonald v. Safir,* 206 F.3d 183, 191 (2d Cir. 2000).

AFFIRMED

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 7, 2000
Before

Hon. Richard A. Posner, *Circuit Judge*
Hon. John L. Coffey, *Circuit Judge*
Hon. Frank H. Easterbrook, *Circuit Judge*

No. 99-1811

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD, Plaintiffs-Appellants,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
vs.	No. 97 C 2963
CHICAGO PARK DISTRICT, Defendant-Appellee.	George M. Marovich *Judge*

ORDER

On September 28, 2000 plaintiffs-appellants filed a petition for rehearing and petition for rehearing en banc and on October 24, 2000, defendant-appellee filed an answer. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc. The petition is therefore
DENIED.

Dated: April 27, 1998
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT MACDONALD,	)	
	)	
Plaintiff,	)	
	)	No. 97 C 2963
v.	)	
	)	Judge George M. Marovich
CHICAGO PARK DISTRICT, a body political and corporate,	)	Magistrate Judge Arlander Keys
	)	
Defendant.	)	

TO: THE HONORABLE GEORGE M. MAROVICH
UNITED STATES DISTRICT COURT JUDGE

REPORT AND RECOMMENDATION

Before the Court is Plaintiff's Motion for Second Preliminary Injunction, pursuant to Federal Rule of Civil Procedure 65. Also before the Court are cross motions for partial summary judgment as to the "facial" challenges, and Defendant's motion for partial summary judgment concerning the "as applied" challenges. For the reasons set forth below, this Court recommends that the application for preliminary injunction, as well as each cross motion for partial summary judgment as to the "facial" challenges, be denied. However, the Court recommends that Defendant's motion for partial summary judgment as to the "as applied" challenges be granted.

BACKGROUND

Plaintiff, Robert MacDonald, and Defendant, the Chicago Park District (the "Park District") are once again before this Court in a continuation of their ongoing dispute concerning Mr. MacDonald's attempts to hold political rallies, addressing the legalization of marijuana, in Chicago's Parks (specifically Grant Park – at Butler Field adjacent to Petrillo Bandshell). For various reasons, Mr. MacDonald has been unable, at least during the past year, to obtain a permit from the Park District for his rallies.[1]

Mr. MacDonald challenges Chapter VII of the Park District's Permit Ordinance (the "Ordinance") both facially and as applied to him.

I. The Ordinance

Although the Park District may undoubtedly impose reasonable time, place, and manner restrictions as part of a facially neutral permitting scheme, the Ordinance provides numerous grounds for denial of a permit that appear to go beyond time, place, and manner restrictions. It is principally those grounds for denial of a permit to which Mr. MacDonald objects.

Section C(3)(a) of the Ordinance requires that a

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1. The Park District did recently grant, in part, a revised permit application for a rally to be held in August of 1998. *See, infra*, n.8.

group of more than fifty people that desires to assemble, or anyone who wishes to use amplified sound other than for his/her own personal enjoyment, obtain a permit for use of the public parks. An application for a permit must be submitted between ten to sixty days in advance of the event, depending on whether the event is a picnic, an athletic event, or a festival.

All applications must be accompanied by an application fee. Ordinance § C(4)(b). Additionally, §C(4) prescribes a substantial user fee, and also requires applicants to purchase liability insurance of at least one million dollars and to post a security deposit.[2]

With respect to the only written waiver provision contained in the Ordinance – § C(6) (c) – the Park District waives the user fee, the security deposit, and/or the insurance requirement (but not the application fee) if the permit is sought for activity "protected by the First Amendment" and the applicant is unable to pay. There is no definition in the Ordinance of what activities are "protected by the First Amendment of the United States Constitution." Ordinance § C(6)(c).

The Park District may, but is not required to, deny a permit for any number of reasons including an

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2. The Park District is supposed to make a decision regarding the permit application within fourteen days. Ordinance §C(5). However, it can extend the decision-making period for an additional fourteen days, without providing any reason for such extension.

applicant's: prior "material misrepresentations" about a permitted event; violations of a prior permit; material falsehoods" on the application; and prior damage to Park District property. *See* Ordinance, § C(5)(e). Although the foregoing bases for permit denial would appear to involve culpable misconduct, there is no requirement of proof or adjudication to determine whether such misconduct has occurred; it appears that the mere belief of the park District official that such misconduct occurred is enough to deny an application. Moreover, the Ordinance is silent on the issue of how long a person can be disqualified from getting another permit, based upon previous violations. The ban on speech and assembly arising from alleged prior misconduct conceivably could last a lifetime.

Notwithstanding its seemingly stringent permit scheme, the Park District sometimes allows more than fifty people to assemble, with artificial amplification of sounds, in the absence of a permit. These permitless events, though neither recognized nor exempted under the Ordinance, occur when there is a "spontaneous" demonstration, or where the Park District or City has "sponsored" an event. The Park District, apparently, makes an ad hoc determination as to whether to allow political rallies to occur (and to ignore/waive its own permit requirements).

For example, even though Mr. MacDonald had no permit for May 10 and 11, 1997, the Park District did not stop his rally and, in fact, helped him to plan for it. Further, he was allowed to use a bullhorn and other means of sound amplification, including portable speakers affixed to poles.

II. Mr. MacDonald's Rallies

In August of 1996, the Park District issued two permits to Mr. MacDonald to hold events similar to the one for which he now seeks a preliminary injunction. After the events, the Park District's Deputy General Counsel, Joan Fencik, gave Mr. MacDonald written notice that his security deposit would not be returned. That letter, dated September 17, 1996, explained that Mr. MacDonald's failure to arrange for portable toilets caused the Park District to incur expenses for delivery and use of such toilets during his events. Additionally, the Park District stated that it incurred expenses: to open and clean the underground bathrooms at Butler Field; to clean the stage and seating area at Butler Field (adjacent to Petrillo Bandshell) after the events; and to restore that seating area to its usual configuration. Finally, Ms. Fencik's letter noted that, at the events, multiple violations of the permits' terms occurred, including: alcohol consumption; unpermitted vendors; unpermitted vehicles; unpermitted tents and canopies; improper location of the generator, in violation of the fire code; and loitering by individuals who remained in the park past 11:00 p.m.

On March 4, 1997, Mr. MacDonald applied to the Park District for a permit to hold a rally and march on May 10 and 11, 1997. Ms. Fencik denied Mr. MacDonald's permit application by letter dated March 12, 1997. Ms. Fencik cited three reasons for denial of Mr. MacDonald's permit: (1) multiple violations of the two permits issued to him in August of 1996; (2) failure to provide proof of his unincorporated association's tax-exempt status; and (3) inability of his association to enter into contracts.

On March 18, 1997, Mr. MacDonald appealed the denial of his permit application to the Park District's General Superintendent. Mr. MacDonald contested all of the alleged previous violations. On March 24, 1997, the General Superintendent denied the appeal and affirmed Ms. Fencik's decision. On March 18, 1997, Mr. MacDonald filed an amended appeal, which the General Superintendent denied on March 26, 1997.

Mr. MacDonald's first motion for preliminary injunction was filed on April 25, 1997, together with the Verified Complaint for Declaratory Judgment and Permanent Injunction.[3] Mr. MacDonald requested an emergency preliminary injunction compelling the Park District to issue a permit for a rally to be held on May 10 and 11, 1997 (from noon until 10:00 p.m. each day). On May 9, 1997, this Court issued a Report and Recommendation, which concluded that Mr. MacDonald's emergency application for a preliminary injunction should

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3. This matter is brought under 42 U.S.C. §1983, and alleges a violation of rights secured by the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment. In the underlying Verified Complaint for Declaratory Judgment and Permanent Injunction ("Complaint")– which challenges the Ordinance both facially and "as applied" – Mr. MacDonald seeks a declaration that the Park District's grounds for permit-denial, set forth in § C(5)(e) of the Ordinance, is unconstitutional. Mr. MacDonald also seeks an injunction permanently prohibiting the Park District from enforcing that portion of the Ordinance.

be denied due to his delay in seeking that relief.[4]

Although no preliminary injunction issued, Mr. MacDonald held a rally on May 10 and 11, 1997. During the rally, the Park District cooperated with him, and assisted him by opening up bathrooms, bringing in garbage cans, and allowed him to use a bullhorn and other sound amplification. No trespassing or other complaint was made against Mr. MacDonald for this event.

On May 23, 1997, Mr. MacDonald filed his second application for a preliminary injunction, requesting an order enjoining the Park District from enforcing its permit ordinance, and permitting him to hold a rally on August 23 and 24, 1997.[5] On July 2, 1997, the parties consented to the exercise of jurisdiction by this Court concerning the second application, and on July 21, 1997, an evidentiary hearing was held. In its Memorandum Opinion and Order of August 15, 1997, this Court granted in part, and denied in part, the preliminary injunction.[6] *MacDonald v. Chicago Park Dist.*, 976 F.Supp. 1125 (N.D. Ill. 1997). On appeal,

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4. On May 30, 1997, the District Court adopted the Report and Recommendation.

5. In supporting memoranda, Mr. MacDonald also sought to enjoin § C(3) of the Ordinance and to compel the Park District to also allow a rally on May 9 and 10, 1998. He did not submit a permit application for either proposed rally.

6. The Order was amended on August 19, 1997.

the Seventh Circuit vacated the preliminary injunction, finding that it was overly broad, and that the balance of harms tipped in favor of the Park District due to the fact that Mr. MacDonald could hold spontaneous rallies (and therefore was not harmed by the permit denial). *MacDonald v. Chicago Park Dist.*, 132 F.3d 355 (7th Cir. 1997).

Currently, Mr. MacDonald requests, in his third application,[7] a preliminary injunction compelling the Park District to issue a permit for a political rally he plans to hold on May 9 and 10, 1998.[8] Mr. MacDonald again seeks to hold the rally – referred to as "Windy City Hempfest" – at Butler Field, near Petrillo Bandshell. (Pl.'s Mot. 2d Prelim. Inj., Ex. A.) Similar to his previously planned events, the rally is expected to draw between 8,000 and 12,000 people. *(Id.)*

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7. Although his motion is entitled "Second Preliminary Injunction", the motion at bar represents Mr. MacDonald's third attempt at preliminarily enjoining the Park District.

8. Mr. MacDonald also sought to hold a political rally on August 22 and 23, 1998, however the parties indicated that they have already resolved that dispute. In fact, the Park District granted, in part, Mr. MacDonald's "revised" permit application for those dates. (Def.'s 12(N), Exs. I, J.) Therefore, the Court will not address the application for those dates.

Mr. MacDonald applied, on the very first day possible (January 2, 1998), for a permit to hold the May 9 and 10, 1998 rally. The application was denied on January 15, 1998. (*Id.* at Exs. A, B.) The Park District's reasons for denial included the fact that Petrillo Bandshell was not available for rental in 1998, and that Butler Field was unavailable for "permit events" due to drainage and turf problems/damage. (*Id.* at Ex. B.) The Park District indicated that there was no area in Grant Park that could accommodate the number of people expected, and that Soldier Field's parking lots were unavailable because of a soccer match. (Pl.'s Mot. 2d Prelim. Inj., Ex. B.)

Additionally the Park District noted the other potential deficiencies in the application[9] that would have to be remedied before a permit could be issued. For example, there was no financial information supporting the request for a waiver of insurance and fees. (Pl.'s Mot. 2d Prelim. Inj. at Ex. B.) Mr. MacDonald did not appeal the denial of this permit application to the General Superintendent. (Def.'s Rule 12(N), Ex. H.)

DISCUSSION AND FINDINGS

I. Motion for Preliminary Injunction

To prevail on a motion for a preliminary injunction,

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9. This is not the first time that the Park District has pointed to such deficiencies in Mr. MacDonald's permit applications. The deficiencies are inexplicable given the history of litigation between the parties.

the movant must initially clear a threshold requirement by showing that: (1) the case has a reasonable likelihood of success on the merits; and (2) there exists no adequate remedy at law and the movant will suffer irreparable harm if the preliminary injunction is not granted. Mu-Mar Shoe Co. v. *Shonac Corp.*, 75 F.3d 1153, 1156 (7th Cir. 1996); *see also Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 313-14 (7th Cir. 1994). If these conditions are met, the initial threshold has been cleared and the court must next: (3) balance the irreparable harm to the movant if the injunction is denied, against the harm to the non-movant if it is issued improvidently; and (4) after weighing the interests of the parties, additionally consider the public interest (*i.e.* non-parties) consequences of either a grant or denial of the injunction. *Mu-Mar*, 75 F.3d at 1156; *see also Storck*, 14 F.3d at 314.

A. "Facial" Challenge

With respect to Mr. MacDonald's "facial" challenge to the Ordinance, and his desire for a preliminary injunction addressing that challenge, the Seventh Circuit has clearly held that a preliminary injunction is unwarranted. *MacDonald*, 132 F.3d at 355. In reviewing this Court's previous injunctive order, the Seventh Circuit held that, in balancing the harms to the parties, the harm to Mr. MacDonald was limited since he can still hold a "spontaneous" rally, pending resolution of this case. *Id.* at 358. The Park District has unequivocally represented to this Court, and the Seventh Circuit, that it will not interfere with any such "spontaneous" rally that Mr. MacDonald may hold. So far, there is no evidence of imminent harm "e.g. (evidence of] the Park District (both] . . . deny[ing] MacDonald a permit for his May 1998 rally

and attempt ting] to prevent that rally from occurring . . . ." *Id.* (emphasis added). Therefore, as to his "facial" challenge, Mr. MacDonald's application for preliminary injunctive relief must fail in light of the Seventh Circuit's holding.

B. "As Applied" Challenge

It is not clear whether Mr. MacDonald is pressing his "as applied" challenge. However, in the interest of maintaining a complete record, the Court will address Mr. MacDonald's "as applied" claims, as well. With respect to his "as applied" challenge to the Ordinance, the Court notes that Mr. MacDonald failed to appeal the January 15, 1998 denial of his permit application. This failure to exhaust administrative remedies is, in the absence of additional evidence,[10] fatal to any "as applied" challenge. Therefore, for any "as applied" challenge, Mr. MacDonald's application for preliminary injunctive relief must fail because he has no likelihood of success on the merits.

C. Recommendation

Mr. MacDonald cannot clear the initial, threshold requirement by showing that: (1) the case has a reasonable likelihood of success on the merits; and (2) there exists no adequate remedy at law and he will suffer

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10. Mr. MacDonald might have been able to argue that the denial was pretextual, and that any appeal would have been futile. However, he provided no evidence that the reasons given by the Park District, in denying this particular permit application, were pretextual or applied differently to him compared to other applicants.

irreparable harm if the preliminary injunction is not granted. Therefore, the Court recommends that his third application for a preliminary injunction be denied.

II. Motions for Summary Judgment

The parties have filed cross motions for partial summary judgment as to Mr. MacDonald's facial challenge to the Ordinance. Additionally the Park District has moved for partial summary judgment as to Mr. MacDonald's as applied challenge to the Ordinance.

Under the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact, and . . . the moving party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56(c).

The initial burden is on the moving party to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (*citing* FED. R. CIV. P. 56(c)). The non-movant then has the burden of providing specific facts, showing a genuine issue "open for trial." *Rush v. McDonald's Corp.,* 966 F.2d 1104, 1109 (7th Cir. 1992); see also *Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920 (7th Cir. 1994) (stating that exclusive reliance on the allegations in the pleadings is insufficient to survive summary judgment). Summary judgment should not be granted if there is sufficient evidence for a jury verdict in favor of the non-moving party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986); *County of Vernon*

v. United States, 933 F.2d 532, 534 (7th Cir. 1991). In deciding a motion for summary judgment, the Court must view all facts in the light most favorable to the non-moving party. *Griffin v. Thomas,* 929 F.2d 1210, 1212 (7th Cir. 1991)

A. Park District's Motion for Summary Judgment – "As Applied" Challenge

The Park District moves for summary judgment as to Mr. MacDonald's "as applied" challenges to the Ordinance. The Park District maintains that Mr. MacDonald has not establish content-based discrimination as to any of the events for which Mr. MacDonald made permit applications that were denied. The only ripe permit denial for which he has "as applied" standing is the application for May 10 and 11, 1997."[11] The Park District's denial of that application appeared to be based upon a provision of the Ordinance concerning prior violations (which will be addressed, below, during discussion of the "facial" challenge). However, Mr. MacDonald was allowed to hold a "spontaneous" rally on May 10 and 11, 1997 despite the denial of his permit. The dispute involving the May 10 and 11, 1997 rally is, therefore, moot, and the Court recommends that Defendant's motion for partial summary judgment as to the "as applied" challenge be granted.

B. Cross Motions for Partial Summary Judgment – "Facial" Challenge

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11. For all his other events, he either did not apply for a permit or did not fully exhaust the appeals process prescribed by the Ordinance.

Prior restraints exist "when a regulation '[gives] public officials the power to deny use of a forum in advance of actual expression.' " *Stokes,* 930 F.2d at 1168 (quoting *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975)). Prior restraints forbid expression before it takes place, in contrast to a subsequent punishment for expression after it occurs. It is clear that the Park District's Ordinance is a prior restraint, because under § C(5)(e), the Park District may deny use of traditional public fora in advance of actual expression or assembly.[12]

"[T]he Constitution requires that the [Park District] establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 760 (1988). A regulation that may be arbitrarily applied has the potential to improperly suppress disfavored speech or disliked speakers. *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 131 (1992) (holding ordinance unconstitutional where it permitted county official to examine contents of message and to correspondingly vary fees for assembly/parades to reflect cost of maintaining public order with respect to the particular message).

In *City of Lakewood v. Plain Dealer Publishing Co.,*

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12. In this respect, also, the case at bar differs from *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied,* 511 U.S. 1085 (1994), because in *Graff,* the plurality opinion (by five of the twelve Judges) determined that operating a newsstand did not directly involve free speech rights.

the Supreme Court invalidated an ordinance as an unconstitutional prior restraint because the ordinance allowed the city to deny a permit – to place newsracks on public property – for any reason, and did not impose a time limit on the decision to grant or deny a permit. The Supreme Court held that the ordinance unconstitutionally gave the deciding official too much discretion.

Unfortunately, here, neither party has addressed in its Local Rule 12(M) or (N) Statements the Park District's historical pre- litigation practices and/or interpretations of the Ordinance, which are essential to determine the degree of discretion enjoyed by the Park District. It is principally the failure of this proof that necessitates the denial of both motions for summary judgment as to the "facial" challenge.

1. Park District's Motion

a. *The Seventh Circuit's Opinion Does Not Foreclose MacDonald's Claims*

The Park District contends that the Seventh Circuit's opinion, vacating this Court's grant of a preliminary injunction, mandates summary judgment in its favor with respect to the "facial" challenge. The Park District argues that the Seventh Circuit "rejected" the "unlimited discretion" argument and "held that section C.5.e. is content-neutral." (Def.'s Mem. Supp. Mot. Summ. J. on Facial Challenge, at 1.) The Park District is wrong.

The Seventh Circuit "emphasize[d] . . . that the decision to grant or to deny a preliminary injunction 'is not a decision on the merits of the plaintiff's suit.'" *MacDonald,* 132 F.3d at 357-58 (quoting *Ayres v. City of Chicago* 125 F.3d 1010, 1013 (7th Cir. 1997)). The Seventh Circuit specifically noted that it was not "suggest[ing] that the permit procedure is itself constitutional simply because it may not be strictly enforced. Our discussion here relates solely to the harm MacDonald would incur from enforcement of the challenged sections of the Code while his lawsuit is pending." *Id.* at 358 n.3. In concluding its opinion, it "emphasized again . . . that today's decision is not one on the merits of any of MacDonald's claims, including the two we have specifically discussed. MacDonald may well be able to establish on a more complete record that at least one or more provisions of [the Ordinance] are facially invalid under the First Amendment." *Id.* at 363 (emphasis added). Although the Seventh Circuit did note – while balancing the harms during its analysis of the preliminary injunction – that *Graff* "poses a substantial obstacle" for Mr. MacDonald, it specifically stated that it was "not definitively resolv(ing] the matter . . . at the preliminary injunction stage . . . ." *MacDonald*, 132 F.3d at 362. This Court takes the Seventh Circuit at its word. Thus, the Seventh Circuit's discussion of Mr. MacDonald's likelihood of success on the crucial issue – the Ordinance's constitutionality – did not determine, or even suggest, that *Graff* foreclosed Mr. MacDonald's underlying Complaint (or eradicated all likelihood of success on the merits).

The Park District's motion for summary judgment on the "facial" challenge could be denied out of hand,

since it is premised entirely on the mistaken notion that the Seventh Circuit's opinion vacating this Court's preliminary injunction foreclosed any facial challenge to the Ordinance. Nevertheless, because the Seventh Circuit did not find Mr. MacDonald's likelihood of success to be as great as this Court did during its analysis on preliminary injunctive review, the Court will carefully examine the reasons the Seventh Circuit gave for not finding an overwhelming likelihood of success on the merits. In light of the Seventh Circuit's finding that Mr. MacDonald has less than an overwhelming likelihood of success – even though not binding – further consideration and analysis of *Graff* is warranted. Thus, the discussion turns to *Graff;* specifically why *Graff* does not mandate summary judgment on Mr. MacDonald's "facial" challenge.

b. *Graff v. City of Chicago*

In *Graff,* a news vendor brought an action challenging the constitutionality of a Chicago ordinance that required the licensing of sidewalk newsstands. 9 F.3d at 1311. For approximately seventy years, a newsstand stood, on a public walkway, in front of the City of Chicago Cultural Center. *Id.* The plaintiff operated his business there starting in July of 1984, when he purchased the stand for more than fifty thousand dollars. *Graff,* 9 F.3d at 1311. At the time he purchased the newsstand, the City ostensibly required newsstand operators to acquire permits. *Id.* Those permits were issued at the discretion of the commissioner of streets and sanitation, and could be revoked at any time by the mayor. *Id.* The City's permitting ordinance stated that newsstands could only sell Chicago papers, provided the mayor with no standards

to guide his discretion, and lacked hearing procedures to review decisions denying or revoking permits. *Id.* The plaintiff attempted to apply for a permit, without success, although permits were issued for other newsstands at other locations. *Id.*

In November of 1990, the City gave the plaintiff two months' notice to remove his newsstand from the sidewalk. *Id.* Although the order was later rescinded, the plaintiff filed a complaint against the City and the mayor, alleging that the ordinance violated the First and Fourteenth Amendments. *Id.* The City amended the ordinance, rather than attempting to defend it; and then argued that the complaint should be dismissed because the new ordinance corrected all constitutional deficiencies. *Id.* Under the new ordinance, the reasons for denial of a permit were things such as whether the design and materials comported with the character of the streetscape and the extent to which services offered by the newsstand are already available in the area. *Id.* at 1317-18. The new ordinance only applied to initial permit applications; renewals were quasi-automatic. *Graff,* 9 F.3d at 1329-30.

However, the plaintiff amended his complaint and made a facial challenge to the new ordinance. *Id.* at 1311. In May of 1992, the City – after consistently objecting to the size and construction materials used in the newsstand – notified the plaintiff that it intended to remove his newsstand from the sidewalk in fifteen days. *Id.* at 1312. The plaintiff applied for a preliminary injunction, which the district court denied. *Id.* A Seventh Circuit panel reversed the district court, holding that the new ordinance failed to provide sufficient judicial oversight, in violation of the First Amendment, per *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990) (holding city's ordinance regulating

adult entertainment businesses was an unconstitutional prior restraint because it failed to provide an effective time limitation on the licensing decision and also failed to provide for prompt judicial review). 9 F.3d at 1312. A petition for rehearing *en banc* was then granted. The Seventh Circuit, sitting *en* banc, held that the City's permit ordinance was constitutional, and vacated the panel opinion. *Id.* at 1313. However, the reasoning of the en *banc* panel differed, and the case produced two concurrences and a dissent, in addition to the plurality opinion. *Id.*

Two major issues were discussed in the opinions of the *en banc* panel: first, whether the ordinance was unconstitutional because there was too much discretion given to the City in deciding whether or not to grant permits; and second, whether there were adequate procedural safeguards available, *e.g.* judicial review. A careful analysis of *Graff* reveals that the Seventh Circuit's rulings do not foreclose Mr. MacDonald's claims on either of these issues.

(1) *Discretion*

As to the first issue – too much discretion - the plurality opinion (written by Judge Manion, and joined by Judges Posner, Coffey, Easterbrook, and Kanne) held that the City's discretion under the ordinance was limited, and did not raise constitutional concerns under prior restraint

analysis.[13] However, that holding does not control the case at bar, because the discretion granted to the City in *Grafff* was limited to aesthetic and safety determinations, in contrast with the broad (and punitive) discretion granted to the Park District under the Ordinance, and because the ordinance in *Graff* applied only to the first permit application. Each of these distinctions will be discussed in turn.

(a) *Comparison Between the Ordinance and the Graff Scheme*

The discretion the City had in *Graff* was limited to things such as aesthetics and safety. 9 F.3d at 1317-18, 1329. There was no facially evident unbridled discretion to deny the permit based upon prior conduct or speech. *Graff*, 9 F.3d at 1318, 1329.

This Court, in its earlier Memorandum Opinion and Order, found three primary sources of discretion in the Ordinance that give the Park District substantial power (whether or not exercised) to censor based on the content or viewpoint of speech: discretion to deny permit applications; discretion as to the fees and expenses imposed on permittees; and discretion as to the time taken to process an application.

Mr. MacDonald's primary challenge is centered on

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13. The plurality initially found that the ordinance did not constitute a prior restraint, but proceeded to analyze it as a prior restraint anyway. *Id.* at 1313.

§ C(5)(e). Section C(5)(e) concerns contents of notice and grounds for denial of a permit, and reads as follows:

> To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:
>
> (1) the application for permit . . . is not fully completed and executed;
>
> (3) the application for permit contains a material falsehood or misrepresentation; . . .
>
> (5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District; . . . [or]
>
> (11) the use or activity intended by the applicant is prohibited by . . . the regulations of the General Superintendent . . . .

(emphasis added).

The Park District appears to have available, under

this subsection, at least four alternative means of exercising discretion. First, the Park District has discretion to determine what conduct constitutes a material misrepresentation, a violation of a prior permit, a material falsehood on an application, or damage to Park District property on a prior occasion (collectively referred to herein as "alleged misconduct"). Second, the Park District decides who was responsible for the alleged misconduct. Third, assuming that there is some basis advanced under § C(5)(e) to deny a permit, the Park District also may have discretion to decide which applications to deny, and which to permit, despite alleged misconduct.[14]

There are no objective criteria in the Ordinance for determining the existence of alleged misconduct and its effect on permit seekers. There is also no provision for what type of evidence is required to prove alleged misconduct, or even that any proof is necessary.[15] Further, it is not even clear who at the Park District is designated to make these determinations. This provision could allow any Park District employee to make a notation

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14. The subpart regarding a "complete" permit, and the one specifying denial for activities prohibited by regulations of the General Superintendent, also are subject to discretion.

15. An honest error in completing an application could be a material misrepresentation in the eyes of the Park District. An incorrect projection about crowd size could also be one. If an application predicted hundreds of attendees, but thousands showed up, this too could count as a material misrepresentation.

in a file that he/she found or somehow learned (perhaps from hearsay), that a person who obtained a permit and held a rally violated some provision of the Ordinance.

Additionally, there is no provision for notifying an individual, who engaged in alleged misconduct, that the Park District has made such a determination. Almost any prior permittee could be alleged (rightly or wrongly) to have "damaged" park property, if only by trampling the grass. The only way for that person to find out about the Park District's determination is when he/she (next)[16] applies for a permit. There is no opportunity or procedure in place for such an individual to challenge the Park District's determination – at least not until after a permit is applied for, and then denied, based upon those reasons.

Even more troubling, there is no limit on how long an instance of alleged misconduct can cause an individual to be barred from obtaining a permit. The Ordinance provides no maximum penalty time; there is absolutely no cut-off point or end in sight. Thus, it appears that the Park District could choose to exercise its discretion to prevent someone from ever, in his/her lifetime, getting a permit (again). This subjective determination could be even more invidious due to the fact that permit seekers whose audiences have caused prior permit violations (and therefore alleged misconduct vis a vis the permittee) are likely those whose speech generates the most public

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16. The Park District could also state alleged misconduct as a reason for turning down a first time permit applicant, if, for example, the applicant was alleged to have spray painted graffiti on Park District property.

outcry. This ability to censor individuals based on the mere allegation of prior misconduct is a far cry from the City's ability in *Graff* to dictate the number of newsstands and the materials used in the construction of such newsstands.

Section C(4)(c) states that no permit shall be granted unless the applicant has:

> executed an agreement with the Park District [promising] to bear all costs of policing, cleaning up and restoring the park upon conclusion of the event or activity; to reimburse the Park District for any such costs incurred and to indemnify the Park District and hold the Park District harmless from any liability to any person resulting from any damage or injury occurring in connection with the permitted event proximately caused by the action of the permittee, the sponsoring organizer, its Officers, Employees or agents or any person under their control insofar as permitted by law.

(emphasis added).

This provision conditions the issuance of a permit on the ability of the applicant to pay for injuries and damage resulting from speech and assembly. The indemnification and reimbursement expenses depend upon the crowd's reaction to the speech and assembly. Thus, by requiring the permit applicant to personally bear the cost of his/her public rally, the conveyance of unpopular messages could be chilled. This provision could

dissuade speakers from using public parks for political speeches because of a fear of huge financial consequences. This regulation could be used to punish a speaker for attracting too many followers – a large crowd might result in a speaker being held responsible for trampling of grass and could result in charges for resodding the park. Contrastingly, an unpopular speaker may be assessed the costs of cleaning up broken bottles thrown at him by the angry crowd. Moreover, the Ordinance also requires the applicant to guarantee in advance that, if the crowd is hostile to his/her message and resultingly requires a large security contingent, he/she will pay for that "policing." That requirement appears to contravene *Forsyth*'s holding that the cost of maintaining order cannot be passed on to those wishing to demonstrate in a public forum as a pre-condition of the granting of a permit. Nothing in the ordinance at issue in *Graff* would have imposed such onerous financial burdens on the exercise of speech in a public forum.

Section C(4)(d), concerns security deposits and states:

> no application for permit shall be granted unless the applicant has paid . . . the security deposit in an amount in accordance with the schedule of fees . . . The amount of the security deposit set in the schedule of fees shall be equal to the estimated cost of policing, cleaning up, and restoring the park upon the conclusion of the use or activity. . . . Promptly after the conclusion of a permit activity, the Park District shall inspect the premises and equipment used by the permittee.

> (2) If it is determined by such inspection, that the permitted event proximately caused damage . . . or . . . that fines should be assessed . . . the Park District shall retain the security deposit or any portion, thereof, necessary to pay for the cost repair or any fines assessed against the permittee. . . .

Again, similar to § C(4)(b), there are concerns about the differing categorizations and amounts. Also, like §C(4)(c), the costs imposed here go, in part, towards "policing" the event. Additionally, the Park District cannot, and does not, determine whether the debris or graffiti being cleaned up is from the speaker or, rather, from an unruly crowd, not under the permittee's control. The Park District's schedule of fees provides that security deposits triple for organizations which have forfeited their security deposits at prior events. This punitive trebling of the security deposit seems to be another penalty imposed for the crowd's reaction to a previous message. As the Supreme Court explained in *Forsyth*, a regulation was invalid because "[t]hose wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." *Forsyth*, 505 U.S. at 134. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35. Nor can an applicant's future speech be barred outright because prior speech has offended such a mob.

Section C(4)(e) states that '[n]o application for permit shall be granted unless the applicant has paid . . . a user fee . . . ." Again, similar to those provisions

discussed above, the amounts per category, on the schedule of fees, for user fees differ and the categorization of events appears subjective. This discretion – if the choice is made by the Park District and not the permit applicant – to categorize an event, combined with the extreme variations of user fees, strongly indicates that the Park District is attempting to impose a tax or raise revenues, rather than merely recover its administrative expenses for paperwork; although this determination will have to await trial.

Section C(4)(f) imposes a hefty insurance requirement on applicants:

> Applicant shall procure and maintain at all times during its use of Park District property, insurance in such amounts and with such coverages as shall reasonably be required by the Park District .... The Division of Risk Management shall prepare a uniform schedule of insurance guidelines for particular types of activities. Applicant shall provide Park District with a certificate from an insurer evidencing such coverage prior to applicant's use of Park District Property . .

Although the insurance requirement is waivable in some discretionary cases, there is no provision for waiver if the applicant is unable to obtain insurance because no company will provide it. This provision appears to allow the Park District to pass along its discretion to the insurance companies; the insurance providers decide whether an event is too risky to insure, and may (and likely will) make their determination based on the

message/content of the event. Those with unpopular views (especially those likely to receive a negative response from the public) will have a difficult (if not impossible) time getting insurance, or it will cost them much more. *See Collin v. Smith,* 447 F. Supp. 676, 684 (N.D. Ill. 1978) (insurance was beyond the reach of Nazi organization because "insurance companies are simply not interested in writing the kind of policy required due to the unknown risks involved . . . ."), *aff'd,* 578 F.2d 1197 (7th Cir. 1978), *cert. denied,* 439 U.S. 916 (1978); see also *Pritchard v. Mackie,* 811 F. Supp. 665, 668 (S.D. Fla. 1993) (insurance requirement "fails to take into account the possibility that the most heinous political groups in American society may find it difficult, if not impossible to actually purchase insurance.").

The Park District is not required to assist an applicant in obtaining insurance, but it sometimes chooses to help, itself an indication that insurance is sometimes difficult to obtain. In *Graff* there was no requirement of insurance in order to have a newsstand.

Finally, § C(6)(c) provides for waiver, but such waiver is totally discretionary:

> Any requirement for a user fee, security deposit, or certificate of insurance shall be waived by the General Counsel, if the activity is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity . . . .

(emphasis added).

Thus, if the Park District's General Counsel, Ms. Fencik, determines that an activity is "protected" and that the user fee, security deposit, or certificate of insurance is financially overburdensome, then those requirements are waived. There is no definition of what are "protected" activities. Presumably, all speech and assembly are protected by the First Amendment, but such a reading of the Ordinance would render the "protected by the First Amendment" language superfluous."[17] This ability to grant or deny a waiver based on the Park District's determination as to whether an activity is protected by the First Amendment, is precisely the type of discretion absent in *Graff* – that the concurring opinion of Judge Flaum stated would violate the First Amendment. *See Graff,* 9 F.3d at 1333.

"Freedom of speech . . . [is] available to all, not merely to those who can pay their own way." *Murdoch v. Pennsylvania,* 319 U.S. 105, 111 (1943). The Park District cannot generate profits/revenues by taxing the exercise of First Amendment Rights. "A state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdoch,* 319 U.S. at 113. This is doubly true when the fees imposed are discretionary, based on what permittees are seeking. The discretion available under these provisions could make the Ordinance

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17. It appears that the Park District must engage in forbidden discretion in making First Amendment determinations, *Cf., infra,* n.20.

unconstitutional. Again, in contrast, the permit scheme in *Graff* did not appear to give the City any discretion as to permit fees or waivers thereof.

The time for processing applications raises concerns as well. Section C(5)(b) states that all conditions precedent to the issuance of a permit "must be completed at least thirty days prior to the event unless a longer time period is prescribed by the General Superintendent." (emphasis added). Section C(5)((C) provides the Park District with a period of up to twenty-eight days within which to grant or deny a permit:

> If no written denial or conditional approval is issued within fourteen days of the date on which a permit application is fully completed, executed and filed with the appropriate Officer or Employee the application shall be deemed to have been granted a conditional approval Provided, however, the Park District may extend the period of review for an additional fourteen days by issuance of a written notice of extension.

(emphasis added).

"[T]iining is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 163 (1969) (Harlan, J., concurring). A one or two day delay may be intolerable when applied to political speech on a topical issue; where the element of timeliness is essential. Since an enthusiastic crowd can serve to sway the

undecided, even a simple delay in getting that message out could permanently vitiate the expressive content of a demonstration.

Here, the sixty-day advance application requirement for festivals, set forth in the schedule of fees, is extraordinarily long. Even the thirty-day advance application requirement in the Ordinance is too long – it infringes on expressions concerning current events. Furthermore, the procedure for appeal of a denial, §C(6)(a)*(2)*, gives the General Superintendent seven days within which to serve notice of his decision. Section C(6)(a)(2) states:

> The General Superintendent shall have seven days from the date on which the appeal was received in which to serve upon the applicant a notice that he/she has affirmed, modified or reversed the denial or retention of security deposit . . . .

Even if someone who applied thirty days in advance and was subject to the fourteen day extension received a notice of denial in the mail at the very last minute, the application could still be moot, since the appeal process would still have seven days to run. Thus, this seven-day appeal provision increases the Park District's ability to exercise discretion over the permitting process.

(b) *The Ordinance in Graff Applied Only to the Initial Permit Grant*

As the concurring opinion of Judge Flaum (joined by Judge Cudahy) notes, even the limited discretion in

Graft would have been unconstitutional had it also been applied in a permit renewal situation, rather than only to initial permit grants. 9 F.3d at 1329-30. In *Graff,* once the initial permit was granted, the renewal was virtually automatic. *Id.* at 1318 n.5. This *pro forma* license renewal situation did not clearly allow opportunity for a licensing official to suppress speech based upon prior speech. The licensing official would not know what the vendor planned to sell (or sold) until after the initial permit issued. However, if the same criteria (as applied to first time license applicants) also was applied to license renewals, then it would have raised constitutional concerns because of a danger that the licensing officials would use aesthetic or safety issues as " "post hoc rationalizations'" to justify otherwise unlawful suppression of speech (which is exactly what Mr. MacDonald is alleging happened to him). *Graff*, 9 F.3d at 1328 (quoting *City of Lakewood,* 486 U.S. at 758. The case at bar is much like the renewal situation envisioned by Judges Cudahy and Flaum; in fact, under the Park District's Ordinance, an applicant's prior permit experiences are expressly held against him as a basis for permit denial.

Therefore, the situation in *Graff* also differed from the one at issue here because the grants of permits in *Graff* were much more limited, and the decisionmaker's discretion applied only to the initial permit grant and not to renewals thereafter.

(2) *Judicial Review*

With respect to the second issue in *Graff* – adequate procedural safeguards – the Seventh Circuit's holding is unclear. Although the plurality of five (Judges

Posner, Coffey, Easterbrook, Manion, and Kanne) held that a common law writ of certiorari was an adequate safeguard for a prior restraint, it does not appear that any of the concurring (or dissenting) Judges agreed. *See 11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 1000 n.17 (4th Cir. 1995) (discussing *Graff* and determining that the majority of the Seventh Circuit did not hold that the prompt judicial review requirement is satisfied when common law certiorari is available). Instead, it appears that at least five Judges found that a common law writ of certiorari would not satisfy First Amendment concerns – (the three dissenters – Judges Cummings, Bauer and Fairchild, as well as concurring Judges Cudahy and Flaum). Concurring Judges Ripple and Rovner did not explicitly address the issue, but seemed to agree with the dissent that the "literal" strict application of *FW/PBS* and *City of Lakewood*, would lead to an invalidation of the City's ordinance. *Graff*, 3 F.3d at 1333-35 (Judge Ripple, with Judges Cudahy and Rovner concurring).[18]

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18. However, they also found that *FW/PBS* and *City of Lakewood* were inapplicable to the particular City ordinance because of an absence unbridled discretion.

19. In *Freedman*, the Supreme Court held that a statute, requiring the submission of movies to state censors before exhibition, was an unconstitutional prior restraint on expression because it lacked judicial participation and gave no assurance of prompt judicial review. 380 U.S. at 51. *Freedman* held that, in order to provide proper safeguards, the censor (not the exhibitor) would have the burden of instituting judicial proceedings, and then

Additionally, the concurring opinion of Judge Flaum, joined by Judge Cudahy, expressly rejected the plurality's view. That concurring opinion stated that a common law writ of certiorari was not the sort of review that *Freedman v. State of Maryland*, 380 U.S. 51 (1965)[19] envisioned and, therefore, was an inadequate safeguard against prior restraints imposed by City officials acting with unbridled discretion.[20] *Graff*, 9 F.3d at 1331.

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proving, during those proceedings, that the expression was unprotected. *Id.* at 58-59. Furthermore, *Freedman* held that the scheme must assure a prompt final judicial determination. *Id.*

20. However, the concurrence ended up finding that the ordinance did not vest City officials with unbridled discretion. Additionally, this concurrence noted that "the judgments we wisely do not trust to administrative officials without the benefit of a watchful judicial eye are those judgments that are made or are likely to be made in the First Amendment plane." *Graff*, 9 F.3d. at 1333. However, the *Freedman* system of judicial review was not necessary for a "nonthreatening" scheme that only asks and allows administrators to make determinations "for which they are especially suited" including questions about aesthetics and traffic flow. *Id.*

21. There is no "holding" of a majority of Judges comprising the *en banc* panel on this point. Therefore this Court is forced to choose between the plurality opinion joined by five Judges, and the opinions of the five Judges who joined either in the concurrence by Judge Flaum or the dissenting opinion. In the absence of more definitive

In the case at bar, the whole determination of adequacy of judicial review turns upon whether the Park District has too much discretion. If the Park District has too much discretion, then the Ordinance constitutes a prior restraint on free speech, and the common law writ of certiorari would be an inadequate procedural safeguard under the rationales set forth in the concurring opinion by Judge Flaum and in the dissenting opinion.[21] If, on the other hand, it is determined that the Park District does not have too much discretion, then *Graff* would govern[22] and the common law writ of certiorari would be an adequate procedural safeguard.

c. *Conclusion*

In viewing the Ordinance in the light most favorable to Mr. MacDonald, the Park District's discretion is far greater than the City's in *Graff*. Therefore, summary judgment in the Park District's favor is foreclosed at this time.

2. Mr. MacDonald's Motion

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guidance, this Court finds the latter more persuasive.

22. If they do not have too much discretion, then irregardless of how the different opinions in *Graft* line up on the issue of adequate judicial review/procedural safeguards, the instant case would be factually indistinguishable from *Graff*.

As discussed above, the determination as to whether the Ordinance is an unconstitutional prior restraint depends on whether the Park District has too much discretion over the issuance of permits. As discussed in the previous section, there are three primary sources of substantial discretion in the Ordinance: (a) discretion to deny permit applications; (b) discretion as to the fees and expenses imposed on permittees; and (c) discretion as to the time taken to process an application. However, viewing each of these in the light most favorable to the Park District, as non-moving party, the Court finds that a reasonable trier of fact could conclude that the Park District's discretion is substantially more limited than it would appear from an initial facial analysis of the Ordinance.

a. *Discretion to Deny Permit Applications*

Mr. MacDonald's primary challenge is centered on § C(5)(e), which concerns the notice and grounds for denial of a permit.[23] Although the Park District appears to have available, under this subsection, at least four alternative means of exercising discretion, reading the Ordinance in the light most favorable to the Park District, it is possible that more objective criteria have, in practice, developed which would guide the application of these otherwise open-ended bases for denial. Although the discretion available under this provision could render it unconstitutional, it is necessary to review more evidence in order to determine whether the Ordinance is actually

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23. He has also raised other challenges during briefing and hearings. *See MacDonald*, 976 F. Supp. 1125.

applied in a subjective fashion, or whether the Park District uses criteria that makes application of these provisions, in reality, non-subjective.

b. *Discretion as to Permit Fees, Costs, and Other Requirements*

The imposition of fees and costs, under § C(4), appears to create another opportunity for the Park District to exercise discretion. Under § C(4)(b), there is no provision for waiver of the application fee for people who cannot afford to pay it. However, perhaps future evidence will show that, in practice, there is some type of waiver available.

Likewise, § C(4)(c), which requires the applicant to agree to bear "policing" and other clean-up costs raises some concerns. Initially, the Court notes that the term "policing" is unclear and that evidence is needed to determine how "policing" has traditionally been interpreted. The evidence may show that "policing" is more limited or that damages from angry crowds are not, in practice, assessed by the Park District. Thus, in the light most favorable to the non-moving party, the Park district, this Court cannot determine that this provision provides the Park District with too much discretion.

Again, similar to § C(4)(b), there are concerns about the differing categorizations and amounts for the security deposit required by § C(4)(d). Like § C(4)(c), the costs imposed here go, in part, towards "policing" the event. Again, more information is needed concerning the Park District's actual practice and prelitigation interpretation of this section.

The insurance requirement in § C(4)(f) arguably allows the Park District to pass along its discretion to the insurance companies. Also, although the Park District is not required to assist an applicant in obtaining insurance, it sometimes chooses to help. It is unclear, at this time, whether the Park District's practice is to help all applicants, or just select applicants. Thus, the insurance requirement does not, when considered in the light most favorable to the non-moving party, require a grant of summary judgment in favor of Mr. MacDonald.

Finally, § C(6)(c) provides for waiver of the user fee, security deposit, and/or the insurance requirements, if the activity the permit is sought for is "protected by the First Amendment" and would otherwise be too financially burdensome for the applicant to pay. The Ordinance provides no definition of what are "protected" activities. Thus, the discretion available under these provisions could make the Ordinance unconstitutional. However, it is necessary to review evidence of the actual application of this rather vague section in order to determine whether the provisions are actually applied in a subjective fashion, or whether the Park District uses criteria that makes applications of these provisions, in reality, non-subjective.

c. *Discretion as to Time for Processing*

Section C(5)(b) requires that all conditions precedent to the issuance of a permit must be satisfied at least thirty days prior to the event unless a longer time period is prescribed by the General Superintendent. Section C(5)(C) provides the Park District with a period of up to twenty-eight days within which to grant or deny a permit. Here, the sixty-day advance application

requirement for festivals, set forth in the schedule of fees, appears extraordinarily long. Even the thirty-day advance application requirement in the Ordinance is quite long. The procedure for appeal of a denial, § C(6)(a)(2), gives the General Superintendent seven days within which to serve notice of his decision. Thus, the processing deadlines and seven-day appeal provision increases the Park District's ability to exercise discretion over the permitting process. Nonetheless, the Park District's practice of allowing "spontaneous" events might, if consistently applied, vitiate this apparent defect. More evidence on this subject (and what constitutes a "spontaneous" rally) is necessary to such a determination.

d. *Conclusion*

Notwithstanding the fact that this Court found enough discretion under the Ordinance's terms to recommend denial of the Park District's motion for summary judgment as to the facial challenge, Mr. MacDonald's cross-motion should also be denied. The terms of the Ordinance appear to give the Park District a lot of discretion, but how the Park District actually interprets its Ordinance is important. In its final analysis, this Court will give deference to any narrowing construction or practice of the Park District. *See, e.g., City of Lakewood,* 486 U.S. at 770 n.11 (citing *Poulos v. State of New Hampshire,* 345 U.S. 395 (1953); *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975)). The Park District's reasonable construction and implementation of the Ordinance may in fact remedy the apparent defects. For example, the Ordinance contains a provision which appears to allow the Park District to permanently prohibit a prior violator from ever holding another event, yet in

practice, it appears that the Park District allows any previous violation to be cured by paying the fine assessed. Therefore, the Park District's interpretation of the Ordinance could change the Court's view of the amount of discretion it has/is exercising. Thus, viewing the facts in the light most favorable to the Park District, in analyzing Mr. MacDonald's motion for summary judgment, at this time, the Court must view the Park District's discretion as only relating to things comparable to aesthetics and safety, which are permissible under *Graff.*

CONCLUSION

Although the Ordinance, on its face, appears to give the Park District too much discretion, there is a genuine issue of material fact with respect to how the Park District actually applies (and interprets) the Ordinance's provisions. Thus, evidence concerning the past practices of the Park District, with respect to interpreting and applying the Ordinance, is necessary to determine whether the Park District actually exercises as much discretion as the Ordinance would seem to allow. For this reason, the Court recommends that neither of the cross-motions for partial summary judgment be granted.

It is therefore recommended that Plaintiff's Motion for Second Preliminary Injunction be denied. The Court further recommends that each cross-motion for partial summary judgment as to the "facial" challenges be denied. Finally, this Court recommends that Defendant's motion for partial summary judgment, as to the "as applied"

challenge, be granted.

DATED: April 27, 1998 RESPECTFULLY SUBMITTED:

/s/
ARLANDER KEYS
United States Magistrate Judge

Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable George M. Marovich. *See* FED. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

Dated: March 8, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT MACDONALD,	)	
	)	
Plaintiff,	)	
	)	No. 97 C 2963
v.	)	Judge George M. Marovich
	)	
CHICAGO PARK DISTRICT, a body political and corporate,	)	Magistrate Judge Arlander Keys
	)	
	)	
Defendant.	)	

TO: THE HONORABLE GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

REPORT AND RECOMMENDATION

Before the Court are the parties' cross-motions for summary judgment. For the reasons set forth below, this Court recommends that Plaintiff's motion for summary judgment be granted, in part. The Court also recommends that Defendant's motion for summary judgment be denied.

BACKGROUND[1]

On April 27, 1998, this Court issued a Report and Recommendation advising the District Court to deny both Defendant's and Plaintiff's cross-motions for summary judgment. In its Report and Recommendation, this Court noted that, even though the Ordinance's provisions appeared to give the Park District too much discretion, future evidence might indicate that the Ordinance is actually applied constitutionally in accord with well-established practice. Hence, this Court stated that additional evidence was necessary to determine whether the Ordinance is, in fact, applied constitutionally. (April 27, 1998, Report and Recommendation at 15, 35—40.)

The District Court agreed that more evidence was necessary. Therefore, upon remanding the cross-motions for summary judgment to this Court (for an amended Report and Recommendation), the District Court ordered the parties to provide evidence about whether the Ordinance is applied constitutionally in well-established practice by "supplement(ing) their respective Local Rule 12(M) and (N) statements consistent with Magistrate Judge Keys' R & R." (July 1, 1998, Order.) The

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1. For a more detailed discussion of the underlying facts and procedural history see *MacDonald v. Chicago Park District,* 976 F. Supp. 1125 (N.D. Ill. 1997) (entering preliminary injunction against Park District), *vacated,* 132 F.3d 355 (7th Cir. 1997); and Report and Recommendation of April 27, 1998.

supplemental information provided in response to the District Court's Order will be addressed in the Supplemental Facts section below.

STANDARD FOR SUMMARY JUDGMENT

The parties have filed cross-motions for summary judgment with respect to the constitutionality of the Ordinance, on its face. According to the Federal Rules of Civil Procedure, the moving party is entitled to summary judgment as a matter of law when "there is no genuine issue as to any material fact." FED. R. CIV. P. 56(c).

The initial burden is on the movant to point out "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (citing Fed. R. Civ. P. 56(c)). The non-moving party then has the burden of providing facts that demonstrate a reason for trial. *Rush v. McDonald's Corp.,* 966 F.2d 1104, 1109 (7th Cir. 1992); *see also Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920 (7th Cir. 1994)(conveying that reliance on mere allegations in the pleadings is not enough to survive summary judgment). Summary judgment should be denied when there is enough evidence for a jury verdict in favor of the non-moving party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986); *County of Vernon v. United States,* 933 F.2d 532, 534 (7th Cir. 1991). The Court must view all the facts in the light most favorable to the non-movant when deciding a motion for summary judgment. *Griffin v. Thomas,* 929 F.2d 1210, 1212 (7th Cir. 1991).

SUPPLEMENTAL FACTS

The Park District has virtually exclusive control over the information concerning "the Park District's historical pre-litigation practices and/or interpretations of the Ordinance," which is the information that Judge Marovich ordered to be presented to this Court. (July 1, 1998, Order, quoting April 27, 1998, Report and Recommendation at 15.) Because the Park District generally provided only superficial answers to Plaintiff's interrogatories, Plaintiff had access to few "supplemental" facts. Thus, the following meager facts have been provided by the Park District, and are the only evidence presented concerning historical practices with respect to the Ordinance.

The Park District states that if a permit application is complete, is accompanied by the appropriate fees, and the location is permitted and available, then it looks at the Ordinance's provisions to determine if anything would prevent the application from being granted. (Plaintiff's Supplemental 12(M), Exhibit N, Defendant's Answers to Second Set of Interrogatories at 3.) In addition, the Park District reiterates that the procedure that determines whether to accept an application is generally prescribed in the Ordinance and through "long established practice." (*Id.*) However, the Park District failed to provide any details about that practice; therefore, the Court cannot, even on a motion for summary judgment, credit this statement.

The categorization of an event is initially made by the applicants. (*Id.*) The applicant checks of f a box that indicates the purpose of the permit. (*Id.*) The Park District

accepts the category chosen by the applicant unless there is a "clear reason" why the chosen category is incorrect. (*Id.*)

The Park District states that the decision to waive permit fees, the requirement for insurance, and other costs is usually referred to the legal department, which makes that decision by giving a "broad interpretation of . . . (the] First Amendment." (*Id.* at 4-5; Defendant's Supplemental 12(N) Additional Facts ¶ 2.) The Park District uses the Windy City Hemp Development Board as an example. This group was granted a waiver for the user fee, security deposit, and insurance. (Defendant's Supplemental 12(N), Additional Facts ¶ 3.)[2] The Park District granted Mr. MacDonald a waiver for insurance and user fees for two earlier events. (Defendant's Supplemental 12(N), Additional Facts ¶ 3; Defendant's Supplemental 12(N), Supplemental Affidavit of Joan Fencik ¶ 4.)

A Park District employee or independent contractor is assigned to monitor permitted events, and that individual checks the permitted area before, during, and after the event. (Defendant's Supplemental 12(M), Affidavit of Joan Fencik ¶ 11.) This monitor makes notes of damages and permit violations and may also take

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2. Although the Park District does not actually provide a citation for this factual statement in its 12(N), the Court notes that it comes from the Supplemental Affidavit of Joan Fencik, which was attached to Defendant's Supplemental 12(N).

photographs. (*Id.*) The security deposit is withheld if the monitor believes that the permittee proximately caused the damage or undertook activities that were outside the scope of the permit. (*Id.* ¶ 13.)

The Park District has different deadlines for submitting applications for events because some events are more complex than others. (Plaintiff's Supplemental 12(M), Exhibit N, Defendant's Answers to Second Set of Interrogatories at 5.) In addition, the Park District only denies an application for lateness if there is not enough time to conduct all of its responsibilities. (*Id.*) The Park District has "never" used the 14-day extension in C(5)(B) to extend the date of deciding whether to grant a permit application beyond the date of a proposed event, nor has the Park District ever received a complaint on this matter. (Defendant's Supplemental 12(M), Affidavit of Joan Fencik ¶¶ 9,10.)

In 1998, the Park District issued special event permits to 21 groups who had forfeited their security deposits during the previous year. (Defendant's Supplemental 12(N), Ex. A.) However, all of these groups' events appear to be corporate and/or athletic. Furthermore, there is no evidence as to how many permits were denied to individuals or groups who previously forfeited security deposits.

DISCUSSION

Certain provisions of the Ordinance are unconstitutional because they lack neutral criteria limiting the Park District's discretion, or penalize unpopular speech. Additionally, the three cases cited by the Park

District in its Supplemental Memorandum are inapposite, as discussed below.

A. Sections Invalid Because They Lack Neutral Criteria

Because the Ordinance is clearly a prior restraint,[3] *Stokes v. City of Madison*, 930 F.2d 1163, 1168 (7th Cir. 1991), "the Constitution requires that the [Park District] establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988). The Constitution requires neutral criteria because a regulation that may be arbitrarily applied has the potential to improperly suppress disfavored speech or disliked speakers. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *see also Lakewood v. Plain Dealer*, 486 U.S. at 750 (holding invalid an ordinance that allowed the city to deny a permit – to place newsracks on public property – for any reason, and did not impose a time limit on the decision to grant or deny a permit). Further, the neutral criteria that limits an ordinance must be "made explicit by textual incorporation,

3. Under section C (5) (e), the Park District may deny use of traditional public fora in advance of actual expression or assembly.

binding judicial or administrative construction, or well-established practice." *Lakewood v. Plain Dealer*, 486 U.S. at 770.

As discussed below, a considerable amount of the Ordinance's text requires the Park District to exercise its discretion, unbridled by neutral criteria, in deciding whether to issue a permit. Since the text leaves much room for discretion, and there are no judicial or administrative constructions, the validity of the Ordinance must stand or fall on the existence of well-established practice. This Court, in its Report and Recommendation, and the District Court, in its Order, determined that more evidence was necessary to determine whether, despite plain language to the contrary, the Ordinance has actually been historically applied constitutionally. This Court was willing to hold an evidentiary hearing, but both parties expressed the belief that an evidentiary hearing would not be helpful to the Court. (September 30, 1998, Tr. of Proceedings at 4.)

Thus, despite Judge Marovich's Order for the submission of additional evidence, and despite claiming that a hearing was unnecessary, the Park District basically has provided no new evidence to demonstrate a "well-established practice" narrowing construction of the Ordinance. In addition, Defendant's answers to Mr. MacDonald's interrogatories did not provide him with the information he requested, and barely mentioned any historical practices of the Park District. Finally, the Park District's own 12(M) (and Affidavits of Joan Fencik) failed to show evidence that demonstrates a historical practice in its interpretation of the Ordinance, and instead merely parroted the language of the Ordinance or the words

"established practice", without providing any context. Therefore, this Court must conclude that there is no well—established practice limiting application of the Ordinance.[4]

1. Section C(5)(e)

Throughout the history of this case, Plaintiff's primary focus has been on section C(5)(e), which concerns the grounds for denial of a permit, and reads as follows:

> To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature

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4. The Court bases its conclusion on the dearth of evidence, as well as the numerous opportunities given to the Park District to provide this critical information. In addition (and alternatively, in the event that such evidence does exists, but was not presented to Mr. MacDonald or the Court) this Court finds that sanctions are warranted against the Park District for its refusal to fully cooperate in discovery, and, more importantly, for its refusal to produce the evidence (to the Plaintiff and to this Court) as ordered by Judge Marovich on July 1, 1998. FED. R. CIV. P. 37(d); 37(b)(2)(A). T he Court further finds that a just sanction for the Park District's disobedience is to deem, as admitted, the fact that there is no well-established practice limiting application of the Ordinance.

or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:

(1) the application for permit . . . is not fully completed and executed;

(3) the application for permit contains a material falsehood or misrepresentation; . . .

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District; . . . [or]

(11) the use or activity intended by the applicant is prohibited by . . . the regulations of the General Superintendent . .

(emphasis added).

As discussed in this Court's prior Report and Recommendation, the plain language of this subsection fails to provide any neutral criteria to guide the Park District's: determination of what conduct constitutes a material misrepresentation, a violation of a prior permit, a material falsehood on an application, or damage to Park District property on a prior occasion (collectively referred to herein as "alleged misconduct"); decision as to who was responsible for the alleged misconduct; and decision as to which applications (where misconduct has

been found) should be permitted anyway.[5]

Similarly, there are no neutral criteria in the Ordinance for what type of evidence is required to prove alleged misconduct, or even an indication that any proof is necessary. Further, it is not clear who at the Park District is designated to make these determinations – it appears that any Park District employee could make a notation in a file that a prior permittee violated some provision of the Ordinance. Most troubling, however, is the omission of any limit regarding how long an instance of alleged misconduct can cause an individual to be barred from obtaining a permit. The Ordinance provides no maximum penalty. Thus, it appears that the Park District could choose to exercise its discretion to prevent someone from ever getting a permit again. This subjective determination could be even more invidious due to the fact that permit seekers whose audiences have caused prior permit violations (resulting in alleged misconduct vis a vis the permittee) are likely those whose speech generates the most public outcry.

The Park District did provide a list of groups that forfeited security deposits in 1997, but still received permits in 1998. However, none of these groups cited by the Park District appear to have had unpopular or controversial speakers – a strong indication that the Park District is exercising its discretion to deny permits due to prior misconduct only where the speaker is controversial. Most of the groups the Park District listed seem to involve corporate or athletic events[6] (which

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5. The subparts regarding a "complete" permit and specifying denial for activities prohibited by regulations of the General Superintendent also are subject to discretion.

5. "March of Dimes", "Bark in the Park", "Y Me Race Against Breast Cancer", "Cancer Survivors Walk", "Orbis

(continued...)

would only involve incidental free speech, if any). Hence, this is not evidence of a well-established practice that alleviates the Court's concerns. Based on the foregoing, even in a light most favorable to the Park District, the discretion available under this section of the Ordinance renders it unconstitutional, on its face.

2. Section C(6)(c)

Section C(6)(c) provides for waiver of certain fees, but such waiver is totally discretionary:

> Any requirement for a user fee, security deposit, or certificate of insurance shall be waived by the General Counsel, if the activity is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity . . . .

(emphasis added).

(...continued)

Broadcast Group", "Burnham Consultants/Mike Gaynor", "A.V.P.", "Timothy O'Tooles", "Embassy Suites Hotel", "Twin Cities Chicago Aids Ride", "Jack Brazier/2626 Condo Assoc.", "Park Community Church", "Friends of Park/LATE Ride", "G.E. Capitol Corp.", "Tripp Mfg. Company", "Bulls 3 on 3", "Capri Events/Kids's Triathlon", "Capri Events/Mrs. T's Triathlon", "United Negro College Fund", "AIDS Walk Chicago", and "LaSalle Banks Chicago Marathon". (Defendant's Supplemental 12(N), Ex. A.)

As discussed in this Court's previous Report and Recommendation, if the Park District's General Counsel, Ms. Fencik, determines that an activity is "protected" by the First Amendment and that the user fee, security deposit, or certificate of insurance is financially overly burdensome, then those requirements are waived. There is no definition of what are "protected" activities. Presumably, all speech and assembly are protected by the First Amendment, but such a reading of the Ordinance would render the "protected by the First Amendment" language superfluous.

The Park District says that it broadly interprets the language regarding First Amendment activities; however, it notes one grant of (full) waiver -- to the Windy City Hemp Development Board – and reiterates that it previously, on two occasions, granted Mr. MacDonald a waiver for the insurance and the user fees. These are, given the Park District's response to Mr. MacDonald's interrogatories, presumably the only instances in which it granted waivers. The evidence of three isolated waivers is not enough to indicate a well-established practice that would limit the Park District's discretion, even viewed in a light most favorable to the Park District. Because the Park District did not provide the information needed to establish that application of the Ordinance is limited, the Court must look only to the actual language of the Ordinance. As this Court discussed in its April 27, 1998 Report and Recommendation, this provision gives the Park District too much discretion. Therefore, this section of the Ordinance is unconstitutional on its face.

B. Sections Invalid Because They Penalize Unpopular Speech

"Freedom of speech . . . [is] available to all, not merely to those who can pay their own way." *Murdoch v. Pennsylvania*, 319 U.S. 105, 111 (1943). "A state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Id.* at 113. The cost of

maintaining order cannot be passed along to those wishing to demonstrate in a public forum as a pre-condition of the granting of a permit. *Forsyth*, 505 U.S. at 134-35.

1. Section C(4) (c)

Section C(4)(c) states that no permit shall be granted unless the applicant has:

> executed an agreement with the Park District (promising] to bear all costs of policing, cleaning up and restoring the park upon conclusion of the event or activity; to reimburse the Park District for any such costs incurred . . . and to indemnify the Park District and hold the Park District harmless from any liability to any person resulting from any damage or injury occurring in connection with the permitted event proximately caused by the action of the permittee, the sponsoring organizer, its Officers, Employees or agents or any person under their control insofar as permitted by law.

(emphasis added).

This provision conditions the issuance of a permit on the ability of the applicant to pay for injuries and damage resulting from speech and assembly. The indemnification and reimbursement expenses depend upon the crowd's reaction to the speech and assembly. Thus, by requiring the permit applicant to personally bear the cost of his/her public rally, the conveyance of unpopular messages could be chilled. This provision could dissuade speakers from using public parks for political speeches because of a fear of huge financial consequences. This regulation could be used to punish a speaker for attracting too many followers; for example, a large crowd might result in a speaker being held

responsible for trampling of grass and could result in charges for resodding the park. By contrast, an unpopular speaker night be assessed the costs of cleaning up broken bottles thrown at him/her by the angry crowd. Moreover, the Ordinance also requires the applicant to guarantee in advance that, if the crowd is hostile to the message and resultingly requires a large security contingent, he/she will pay for that "policing". That requirement directly contravenes Forsyth's holding that the cost of maintaining order cannot be passed on to those wishing to demonstrate in a public forum as a pre-condition of the granting-of a permit. Thus, this section of the Ordinance is facially unconstitutional.

2. Section C(4)(d)

Section C(4)(d), concerns security deposits and states:

> no application for permit shall be granted unless the applicant has paid . . . the security deposit in an amount in accordance with the schedule of fees . . . The amount of the security deposit set in the schedule of fees shall be equal to the estimated cost of policing, cleaning up, and restoring the park upon the conclusion of the use or activity. . . Promptly after the conclusion of a permit activity, the Park District shall inspect the premises and equipment used by the permittee . . . .
>
> (2) If it is determined by such inspection, that the permitted event proximately caused damage . . . or . . . that fines should be assessed . . . the Park District shall retain the security deposit or any portion, thereof, necessary to pay for the cost of repair or any fines assessed against the permittee . . . .

Like § C(4)(C), the costs imposed here go, in

part, towards "policing" the event. However, this section chiefly deals with security deposits, and requires that the security deposit be equal to the estimated cost of policing and cleaning up after the conclusion of an activity. In its previous Report and Recommendation, the Court expressed concerns that this section would deter a person from delivering a speech that incited bottle throwers because the person would have to pay more for the permit. The Park District states that it only holds the speaker accountable for damages that are "proximately" caused by the speaker. (Defendant's Supplemental 12(M), Affidavit of Joan Fencik ¶ 13.) But there is no evidence regarding the standard or procedures the Park District uses in calculating what damages are proximately caused by the speaker, and what damages are not.[7]

Additionally, the Park District cannot, and does not, determine whether the debris or graffiti being cleaned up at the site of the event is from the speaker or from an unruly crowd not under the perinittee's control. The Park District's schedule of fees provides that security deposits are tripled for organizations that have forfeited their security deposits at prior events. This punitive trebling of the security deposit is another penalty imposed for the crowd's negative reaction to the speaker's message. As the Supreme Court explained in *Forsyth*, a regulation was invalid because '(t]hose wishing to express views unpopular with bottle throwers, f or example, may have to pay more for their permit." *Forsyth*, 505 U.S. at 134. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35. Nor can an applicant's future

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7. This also raises similar issues of unfettered discretion and lack of evidence of narrowing through well-established practice, as were addressed in Part A of this Report and Recommendation.

speech be barred outright because prior speech has offended such a mob. Thus, this provision of the Ordinance is facially unconstitutional.

3. Section C(4)(f)

Section C(4) (f) imposes a hefty insurance requirement on applicants:

> Applicant shall procure and maintain at all times during its use of Park District property, insurance in such amounts and with such coverages as shall reasonably be required by the Park District . . . . The Division of Risk Management shall prepare a uniform schedule of insurance guidelines for particular types of activities. Applicant shall provide Park District with a certificate from an insurer evidencing such coverage prior to applicant's use of Park District Property . . . .

There is no provision for waiver if the applicant is unable to obtain insurance because no company will provide it. This section allows the Park District to pass along its discretion to the insurance companies – the insurance providers decide whether an event is too risky to insure, and may (likely will) make their determination based on the message or content of the event. Those with unpopular views (especially those likely to receive a negative response from the public) will have a difficult, if not impossible time getting insurance, or it will cost them much more. See *Collin v. Smith*, 447 F. Supp. 676, 684 (N.D. Ill. 1978) (insurance was beyond the reach of Nazi organization because "insurance companies are simply not interested in writing the kind of policy required due to the unknown risks involved . . . ."), aff'd, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978); *see also Pritchard v. Mackie*, 811 F. Supp. 665, 668 (S.D. Fla. 1993) (insurance requirement "fails to take into account

the possibility that the most heinous political groups in American society may find it difficult, if not impossible to actually purchase insurance."). The Park District is not required to assist an applicant in obtaining insurance, but it sometimes chooses to help[8] - itself an indication that insurance can be difficult to obtain. Thus, this provision of the Ordinance is facially unconstitutional.

C. Park District's Cases

The Park District does not again raise discussion of *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993)(en banc), in its Supplemental Memorandum. Therefore, this Court simply incorporates its previous exhaustive analysis of *Graff*'s inapplicability to the instant case from the April 27, 1998 Report and Recommendation. The Park District does cite three new cases to support its argument that the Ordinance is constitutional; however, none of these cases are controlling. In addition, all of these cases are distinguishable from the present situation.

MacDonald v. City of Chicago, 97 C 5266, 1998 U.S. Dist. LEXIS 15361, at *3 (N.D. Ill. September 23, 1998) and *MacDonald v. Safir*, No. 98 Civ. 2332, 1998 U.S. Dist. LEXIS, at *2 (S.D. N.Y. June 16, 1998) both involved parade ordinances (and denial of parade permits for major public streets). The present case, however, does not involve a permit scheme for a parade. Instead, the Ordinance here covers the use of parks for a variety of activities, including pure speech. As the

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8. Again, this raises issues of unfettered discretion and lack of evidence of narrowing through well-established practice, similar to those addressed in Part A of this Report and Recommendation.

Supreme Court has held, the First Amendment does not give the same protection to conduct such as marching and patrolling as it does to expressing oneself through pure speech. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969). Therefore, the present Ordinance is more closely examined than a parade ordinance.

The Park District also cites *Gasparo v. City of New York*, No. 98 CV 3168, 1998 U.S. Dist. LEXIS 12300, at *30—31 (E.D. N.Y. May 26, 1998) and notes that the district court found the discretion of New York City in licensing newsstands to be similar to that of Chicago in *Graff*. (Park District's Supplemental Memorandum at 7.) The Park District argues that *Gasparo*'s finding of similarity to *Graff* supports a finding that the Ordinance here is facially constitutional. However, that argument is unavailing. This Court has already exhaustively distinguished the city's discretion in *Graff* from the Park District's discretion in the instant case. (April 27, 1998, Report and Recommendation at 16—32.) In short, the discretion afforded by the scheme in *Graff* was much less than the unbridled discretion afforded by the Ordinance here. *Gasparo*'s finding of similarity to *Graff* does not now make *Graff* any more applicable to this case than it was before. In fact, because the ordinance in *Gasparo* was found to give discretion similar to that of the city in *Graff*, *Gasparo*, too, is distinguishable from the present case.

CONCLUSION

The Court has carefully reviewed all the facts presented, and recommends that the Defendant's motion for summary judgment be denied. Further, the Court recommends, that Plaintiff's motion for summary judgment be granted, in part, with respect to sections C(5)(e), C(6)(c), C(4)(c), C(4)(d), and C(4)(f) of the Ordinance.

DATED: March 8, 1999

RESPECTFULLY SUBMITTED:

/s/

ARLANDER KEYS
United States Magistrate Judge

Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable George M. Marovich. *See* FED. R. CIV. P.72(b); 28 U.S.C. S 636(b)(l). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

Dated: March 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT MACDONALD, Plaintiff,	)	
v.	)	No. 97 C 2963
CHICAGO PARK DISTRICT, Defendant.	)	Judge George M. Marovich

MEMORANDUM OPINION AND ORDER

Defendant Chicago Park District (the "Park District") has filed written objections to Magistrate Judge Keys' Report and Recommendation ("R & R") entered on March 3, 1999. Magistrate Judge Keys' R & R considered cross-motions for summary judgment filed by Plaintiff, Robert MacDonald ("MacDonald"), and the Park District concerning a facial challenge to the constitutionality of the Park District's Permit Ordinance (the "Ordinance"). In his R & R, Magistrate Judge Keys recommended that MacDonald's motion for summary judgment be granted in part and that the Park District's motion for summary judgment be denied. For the reasons set forth below, this Court sustains the Park District's objections to Magistrate Judge Keys' R & R, denies MacDonald's motion for summary judgment and grants the Park District's motion for summary judgment.

BACKGROUND

Because this is the sixth time that a court in this district has considered this case, the Court will rely heavily on the factual background described in earlier opinions. For a more detailed discussion of the underlying facts and procedural history, *see MacDonald v. Chicago Park Dist.*, 976 F. Supp. 1125 (N.D. Ill. 1997), *vacated*, 132 F.3d 355 (7th Cir. 1997); Report and Recommendation of April 27, 1998; July 1, 1998 Order; Report and Recommendation of March 8, 1999.

MacDonald and the Park District are once again before this Court as part and parcel to their ongoing dispute concerning the constitutionality of the Park District's permit procedure.[1] At this stage in the proceedings, MacDonald makes a facial challenge to the constitutionality of the Park District Code. MacDonald's interest in doing so relates – at least in part – to his professed desire to hold future rallies in Grant Park (particularly in Butler Field adjacent to the Petrillo Bandshell) in order to advocate drug policy reform,

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1. The Park District's permit requirement applies to, among other things, any public assembly or other event that involves more than fifty persons, that uses amplified sound, that includes a musical performance, or that involves the erection of any tent, stage, or other structure on Park District property. *See* Park District Code § C(3)(a).

including the legalization of marijuana.[2]

MacDonald's proposed rallies would include, *inter alia*, approximately 10,000 attendees per day, live music, vendors, tents, and amplified sound. MacDonald staged two such rallies in August 1996, after obtaining permits from the Park District.[3] Yet, when he applied for a further permit to hold a similar rally in May of the following year, the Park District denied his application, citing various violations of the two earlier permits. The Park District Code authorizes the denial of a permit if the applicant "has violated the terms of prior permits issued to or on behalf of the applicant." Park District Code § C(5)(e). Although the Park District denied MacDonald's permit application, and his request for a preliminary injunction addressed to that denial was refused, the Park District permitted MacDonald to hold his rally on May 10-11,

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2. Grant Park, like other parks within the City of Chicago, is exclusively under the Park District's control. Grant Park is a traditional public forum.

3. The Park District's permit requirement applies to, among other things, any public assembly or other event that involves more than fifty persons, that uses amplified sound, that includes a musical performance, or that involves the erection of any tent, stage, or other structure on Park District property. *See* Park District Code § C(3)(a).

1997.[4] The Park District also assisted MacDonald by opening bathrooms, providing garbage cans, and allowing MacDonald to use portable speakers to amplify sound.

Nevertheless, fearing that the Park District would continue to deny permit applications to him based on his earlier violations, MacDonald advanced a facial challenge to the Park District's permit procedure, arguing that portions of the Park District Code are facially invalid because they violate the First Amendment.

MacDonald's challenge to the Park District's permit procedure is primarily directed against section C(5)(e) of the Park District Code, which governs the grounds for denial of a permit application. That section provides:

> Notice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit. Where an application for permit has been denied because a fully executed prior application for the same time and place has been received, and a permit has been or will be granted to the prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area, the Park District

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4. Consistent with Park District "practice," MacDonald was allowed by the Park District to hold "'spontaneous' First Amendment rallies and demonstrations." *MacDonald*, 132 F.3d at 358.

> shall propose an alternative place, if available, for the same time, or an alternative time, if available, for the same place.
>
> To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:
>
> (1) the application for permit, including any required attachments and submissions, is not fully completed and executed;
>
> (2) the applicant has not tendered the required application fee with the application or has not tendered the required user fee, indemnification agreement, insurance certificate, or security deposit within the times prescribed by the General Superintendent;
>
> (3) the application for permit contains a material falsehood or misrepresentation;
>
> (4) the applicant is legally incompetent to contract or to sue and be sued;
>
> (5) the applicant or the person on whose behalf the application for permit was made has on prior

occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part thereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;

(8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

(10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;

(11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the

Park District, or by the regulations of the General Superintendent.

Park District Code § C(5)(e). MacDonald has also challenged certain fee and insurance provisions in the Park District Code as being facially invalid. *See* Park District Code §§ C(6)(c), C(4)(c), C(4)(d) and C(4) (f)

Pursuant to this Court's referral order, on April 27, 1998, Magistrate Judge Keys issued a R & R advising the Court to deny both the Park District's and MacDonald's cross-motions for summary judgment. In his R & R, Magistrate Judge Keys noted that, even though the Ordinance's provisions appeared to give the Park District too much discretion – in violation of the First Amendment – future evidence might indicate that the Ordinance is actually applied constitutionally in accord with well-established practice. Accordingly, Magistrate Judge Keys stated that additional evidence was necessary to determine whether the Ordinance is, in fact, applied constitutionally by the Park District. (April 27, 1998, Report and Recommendation at 15, 35-40.)

This Court agreed with Magistrate Judge Keys that more evidence was necessary in order to complete the record. Therefore, upon remanding the cross-motions for summary judgment to Magistrate Judge Keys (for an amended R & R), this Court ordered the parties to provide evidence about whether the Ordinance is applied constitutionally in well-established practice by "supplement[ing] their respective Local Rule 12(M) and (N) statements consistent with Magistrates Judge Keys' R & R." (July 1, 1998, Order.)

On March 3, 1999, Magistrate Judge Keys issued an amended R & R advising this Court to deny the Park District's motion for summary judgment and grant, in part, MacDonald's motion for summary judgment. Specifically, Magistrate Judge Keys found that sections C(5) (e), C(6) (c), C(4) (c), C(4) (d), and C(4) (f) of the Park District Code were unconstitutional because, *inter alia*, they provided too much discretion to Park District officials and presented an unacceptable risk that protected speech could be chilled or suppressed.

DISCUSSION

I. Standard of Review

Section 636(b) (1) (B) of Title 28 authorizes a district court to refer a matter to a magistrate judge to conduct an evidentiary hearing. Following this hearing, the magistrate judge cannot enter a final judgment, but must submit to the district court proposed findings of fact and recommendations for disposition, to which either party may file written objections within 10 days. 28 U.S.C. § 636(b) (1) (B); Fed. R. Civ. p. 72(b). The district court is required to conduct a *de novo* review of those portions of the magistrate judge's report and recommendations to which specific written objections have been filed. This *de novo* review is not the same as a *de novo* hearing, however. The district court is not required to conduct another hearing to review the magistrate judge's findings and credibility determinations. *United States v. Raddatz*, 447 U.S. 667, 675 (1980); *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995); *United States v. Severson*, 49 F.3d 268, 273 (7th Cir. 1995). Rather, the district court has discretion to "accept, reject, modify, in whole or in part, the findings or

recommendations made by the magistrate." 28 U.S.C. § 636(b) (1); Fed. R. Civ. P. 72(b). If the district court finds a problem, it may take additional evidence, call witnesses, or remand to the magistrate judge for further development. *Raddatz*, 447 U.S. at 675. But if following a review of the record the district court is satisfied with the magistrate judge's findings and recommendations, it may in its discretion treat those findings as its own. *Id.* at 676.

II. Section C(5)(e)

At this point in the proceedings, it would be an understatement to note that this Court is not writing on a clean slate. The applicable constitutional standards have been addressed, *ad nauseam*, by Magistrate Judge Keys, this Court and the Seventh Circuit. Everyone appears to be in agreement that section C(5)(e) is "content-neutral" and, therefore, the critical determination is whether section C(5)(e) entrusts the Park District with "virtually unlimited discretion" in awarding or denying permits. *See MacDonald*, 132 F.3d at 361.

In *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988), the Supreme Court considered a city ordinance giving the mayor authority to grant or deny applications for annual permits to place newsracks on public property. The Court explained that when a licensing statute allegedly vests "unbridled discretion" in a government official over whether to permit or deny expressive activity, it poses significant "First Amendment risks" of undetectable content-based censorship as well

as self-censorship on the part of the speaker to avoid being denied a license to speak. *Id.* at 757-58. The Court cautioned that these dangers are "at [their] zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id.* at 763.

Recognizing the dangers inherent in licensing schemes affording unbridled discretion, the Seventh Circuit – while considering MacDonald's motion for a preliminary injunction – directed the parties in this case to its en banc decision in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (en banc). *MacDonald*, 132 F.3d at 361. After giving a brief summary of its opinion in *Graff*, the Seventh Circuit opined that the *Graff* holding "poses a substantial obstacle to MacDonald's ability to establish that section C(5)(e) is facially invalid." at 362 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989); *United States v. Kistner*, 68 F.3d 218, 221 (8th Cir. 1995)). Although the Seventh Circuit "emphasized" that its "decision [was] not one on the merits of any of MacDonald's claims," the court was clearly of the opinion that, absent new record evidence from MacDonald to the contrary, section C(5)(e) is constitutional under its decision in *Graff*. *See MacDonald*, 132 F.3d at 363.

Taking the Seventh Circuit at its word, this Court has conducted its own review of section C(5)(e) in light of *Graff* and other authority on the question of what constitutes "unbridled discretion." This Court finds that section C(5)(e) contains ample specific and objective criteria for evaluating permit applications; thus, effectively avoiding the "unbridled discretion" problem

identified by the Supreme Court in *Lakewood*. Moreover, after reviewing the ordinance at issue in *Graff*, the Court believes that the permit criteria outlined in section C(5)(e) are at least as specific as those contained in the *Graff* ordinance.

For example, in *Graff*, the city commissioner could consider, *inter alia*, whether "the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape" or whether the placement of the newsstand "endangers public safety or property." These criteria appear to be far more subjective than many of the Park District's permit criteria complained of by MacDonald, such as whether applicants have made "material misrepresentations" in their permit applications in the past or whether they have "violated the terms of prior permits." *See* Park District Code § C(5)(e). While the Court appreciates that section C(5)(e) contains some ambiguities and places a certain modicum of discretion with Park District officials, "[njot all discretionary decisions implicate the First Amendment." *Graff*, 9 F.3d at 1319 (citing *City of Cincinnati v. Discovery Network. Inc.*, 507 U.S. 410, 430 (1993)).

The most important question that this Court must answer is whether the limited discretion given to the Park District under section C(5)(e) poses a "real or substantial threat" of censorship. *See Ward*, 491 U.S. at 794-95. After considering the text of section C(5)(e) and the limited record evidence available concerning its "historical pre-litigation practices and/or

interpretations,"[5] this Court concludes that the ordinance does not chill or suppress the speech *content* of permit applicants in violation of the First Amendment.[6]

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5. Magistrate Judge Keys complained about the "dearth of evidence" on this point despite the "numerous opportunities given to the Park District to provide this critical information." March 8, 1999, Report and Recommendation at 8 n.4 This Court must echo Magistrate Judge Keys' frustrations with the Park District on this point. From what this Court can glean, the Park District has gone out of its way to ignore several of the orders of this Court and Magistrate Judge Keys. See March 8, 1999, Report and Recommendation at 8 n.4 (finding sanctions warranted for Park District's refusal to cooperate in discovery); July 1, 1998, Order (Court is distressed that the parties have chosen to ignore Magistrate Judge's request for "crucial proof"). Moreover, this is not the only case in which the Park District has gone out of its way to frustrate the Court and obstruct the litigation process. See *Ayres v. City of Chicago*, 97 C 2176, 1998 WL 102791, at *2, *4 (N.D. Ill. Feb. 19, 1999) (Court "deeply troubled" by Park District taking it down "dead-end procedural path"). It should be noted that the present outcome is in spite of, not because of, the Park District's vexatious course of conduct before the Magistrate Judge and this Court.

6. In so far as this Court finds that the permit procedure does not constitute an unconstitutional prior restraint, then the procedural safeguard requirements are satisfied by the common-law writ of certiorari, as explained in *Graff*. *See Graff*, 9 F.3d at 1325, 1331 (seven judges

III. Fee and Insurance Provisions

MacDonald also contends that the Park District is given virtually unbridled discretion in determining the fees for a particular event. Specifically, MacDonald argues that the Park District is given the discretion to vary its fee structure based on the content of an applicant's speech, thereby forcing applicants to bear the cost of maintaining order should their speech be unpopular or "wildly" popular. For example, forcing an unpopular speaker to pay extra for the anticipated cleanup costs of the proverbial bottle throwers.

In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the Supreme Court explained that "[listeners' reaction to speech is not a content-neutral basis for regulation." *Id.* at 134. To this end, governmental bodies may not assess fees which will depend on a "measure of the amount of hostility likely to be created by the speech based on its content." *Id.* That having been stated, the Supreme Court has also recognized that "(t]here is nothing contrary to the Constitution in the charge of a fee" for the maintenance of public order, so long as it does not amount to a surcharge or a "premium" in the case of a controversial political message delivered before a hostile audience. *Id.* at 136 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941)). The fundamental question that this Court must address is whether the Park District's permit fee

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concluded that for content-neutral licensing scheme, the common law writ of certiorari provides adequate judicial review).

structure is – or poses a "real or substantial threat" of becoming – "content-based."

Both parties agree that the applicable permit fees are set based on a content-neutral schedule according to the type of event and the number of people expected (i.e., weddings and picnics pay a $10 application fee, a user fee of $50 per 250 attendees, a security deposit of $100 per 250 attendees, and are required to have a $100 million certificate of insurance).

Moreover, the applicant, rather than the Park District, designates the relevant classification and applies for a particular type of permit. Thus, on its face, the fee structure in question appears to give the Park District little, if any, discretion to make the type of content-based determinations that MacDonald and the Court in *Forsyth* are concerned about. Furthermore, MacDonald has presented no evidence to suggest that the fee structure has been applied by the Park District in a discriminatory manner or in such a way so as to vary the fee based upon the content of the speech at issue.

MacDonald also challenges the Park District's waiver provision that allows applicants to request a waiver of the user fee, security deposit, and insurance requirements "if the activity [proposed by the applicant] is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity." Park District Code § C(6)(c). Under those circumstances, the fee requirements "shall be waived." *Id.*

After reviewing the text of the Park District's waiver provision, the Seventh Circuit opined that, "[a]bsent evidence that this waiver provision has been applied by the Park District in a discriminatory manner, we doubt that it vests too much discretion in local officials under Forsyth." *MacDonald*, 132 F.3d at 363. This Court agrees. Moreover, the limited evidence presented to the Court regarding how this waiver provision has been applied does not support a finding of content-based discrimination.[7] To the contrary, MacDonald and his organization have been granted partial waivers on at least two occasions by the Park District. Thus, while the Court acknowledges that the designation of which activities are "protected by the First Amendment" vests a certain amount of discretion to Park District officials, the waiver provision, on balance, appears to be designed to encourage and protect speech rather than chill or suppress it. Accordingly, the Court finds that the waiver provision in question withstands MacDonald's facial challenge.

CONCLUSION

For the reasons stated above, the Park District's motion for summary judgment is granted and MacDonald's motion for summary judgment is denied.

ENTER:

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7. MacDonald has failed to offer any evidence suggesting that the waiver provision has been applied in a discriminatory manner.

/s/

GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

[The following are those provisions of the Chicago Park District Code of ordinance that are pertinent to the issues presented in this Petition.]

CHAPTER VII. USE OF PARKS.

SECTION A. DEFINITIONS.

For purposes of this chapter, the following words, terms, phrases and their derivatives shall have the meanings set forth in this section . . .

> "Amplified Sound" means any sound projected or transmitted by artificial means, Including, but not limited to, loudspeakers, amplifiers, powered megaphones or any similar devices.

* * *

SECTION C. PERMITS

3. Permit Requirement.

a. General.

No person shall, without a permit:

(1) conduct a public assembly, parade, picnic, or other event involving more than fifty individuals;

* * *

(3) conduct any exhibit, music or dramatic performance, fair, circus, concert, play, radio or television

broadcast, other than a news transmission;

(6) create or emit any Amplified Sound . . .

(7) station or erect any building, tent, canopy, stand, bandstand, stage, tower, scaffold, sound stage, platform, rostrum or other structure;

(8) station or use any electrical or electronic device or equipment that would require outdoor auxiliary power;

(9) sell or offer for sale any goods or services;

* * *

4. Application for Permits.

a. Filing Written Application.

(1) Special Event Permit.

Any person seeking the issuance of a permit shall apply for a permit by filing a written application for permit on a form and within such time as shall be prescribed by the General Superintendent. Applications involving any of the following activities shall be filed with the Region Manager for the region in which the special event is to take place, or his/her designee:

(a) an event involving more than fifty individuals;

* * *

(g) creation or emission of any Amplified Sound,

except from a radio, recorder or other device possessed and used by an individual for his/her own enjoyment and operated in such a manner so is not to interfere with the use and enjoyment by another person . . .

b. Application Fee.

For any activity described in this chapter, Section C.4.a, no application for permit shall be considered unless the applicant shall have paid at the time for filing an application for permit the required application fee in an amount in accordance with the schedule of fees set by the General Superintendent and approved by the Board.

c. Indemnification and Reimbursement Agreement.

No application for permit shall be granted unless the applicant shall have executed an agreement with the park District, on a form to be prescribed by the General Superintendent, in which the applicant shall promise and covenant to bear all costs of policing, cleaning up and restoring the park upon conclusion of the event or activity; to reimburse the Park district for any such costs incurred by the Park District; and to indemnify the Park District and hold the Park District harmless from any liability to any person resulting from any damage or injury occurring in connection with the permitted event proximately caused by the action of the permittee, the sponsoring organization, its officers, Employees or agents or any person under their control insofar as permitted by law.

d. Security Deposit.

For any activity described in this chapter, Section

C.4.a(1), C.4.(a)(2) or Section C.4.(a)(4), no application for permit shall be granted unless the applicant has paid, within the time prescribed by the General Superintendent, the security deposit in an amount in accordance with the schedule of these set by the General Superintendent and approved by the Board. The amount of the security deposit set in the schedule of fees shall be equal to the estimated cost of policing, cleaning up, and restoring the Park upon the conclusion of the use or activity. The security deposit shall be deposited by the Park District into an escrow account. Promptly after the conclusion of a permit activity, the Park District shall inspect the premises and equipment used by the permittee.

(1) If it is determined that there has been no damage to Park District Property or equipment beyond reasonable wear and tear, the security deposit shall be refunded in full within thirty (30) days of the conclusion of the permitted event.

(2) If it is determined by such inspection, that the permitted event proximately caused damage to Park District property in excess of normal wear and tear and which requires repairs in excess of routine maintenance or determined that fines should be assessed against the permittee pursuant to this chapter, Section C.7., below, the Park District shall retain the security deposit or any portion, thereof, necessary to pay for the cost repair or any fines assessed against the permittee. The General Superintendent or his/her designee shall given written notice of the assessment of damages or fine and retention of the security deposit to the permittee by personal delivery or by deposit in the United States mail, with proper postage prepaid to

the name and address set forth in the application for permit. An assessment of damages or fine may be appealed as
provided in this chapter, Section C.6., below.

e. Fees for Use of Park Facilities.

No application for permit shall be granted unless the same shall be accompanied by a user fee as provided in the uniform schedule of fees set by the General Superintendent and approved by the Board. No application for permit shall be granted unless all required fees are paid as specified in paragraph 5(b), below.

f. Insurance.

Applicant shall procure and maintain at all times during its use of Park District property, insurance in such amounts and with such coverages as shall reasonably be required by the Park District and shall name Park District as an additional insured thereunder. The amounts and type of insurance required shall be determined by the Division of Risk Management, based upon the nature of the activity and the risk involved. The Division of Risk Management shall prepare a uniform schedule of insurance guidelines for particular types of activities. Applicant shall provide Park District with a certificate from an insurer evidencing such coverage prior to applicant's use of Park District property, and within the time prescribed by the General Superintendent. The certificate shall also provide that the insurer shall give the Park District reasonable advance notice of insurer's intent to cancel the insurance coverage provided.

g. Permits Not Transferable.

No permit or preliminarily approved permit application may be transferred.

5. Processing of Application for Permits.

* * *

e. Contents of Notice; Grounds for Denial.

Notice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit. Where an application for permit has been denied because a fully executed prior application for the same time and place has been received, and a permit has been or will be granted to the prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area, the Park District shall propose an alternative place, if available, for the same time, or an alternative time, if available, for the same place.

To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application

for permit on any of the following grounds:

(1) the application for permit, including any required attachments and submissions, is not fully completed and executed;

(2) the applicant has not tendered the required application fee with the application or has not tendered the required user fee, indemnification agreement, insurance certificate, or security deposit within the times prescribed by the General Superintendent;

(3) the application for permit contains a material falsehood or misrepresentation;

(4) the applicant is legally incompetent to contract or to sue and be sued;

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part thereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and

previously scheduled for the same time and place;

(8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

(10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;

(11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent.

(12) the applicant has not secured the requisite insurance; or

(13) the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to the applicant.

f. Amendment or Revision of Applications.

Any amendment or revision of an application or permit

shall for purposes of determining the priority of the application for permit, relate back to the original filing thereof; but the time in which the Park District shall grant or deny the application for permit and serve notice of such granting or denial shall be computed from the date of the amendment or revision.

6. Procedures for Review: Waiver

a. Review by General Superintendent.

(1) Any applicant who is denied a permit or a permittee who is assessed damages or a fine pursuant to this ordinance may, within seven days of the service of notice of such determination, file a written appeal from such determination with the General Superintendent;

(2) The General Superintendent shall have seven days from the date on which the appeal was received in which to serve upon the applicant a notice that he/she has affirmed, modified or reversed the denial or fine;

(3) Such notice shall be deemed served upon the applicant or permittee when it is personally delivered or when it is sent by United States mail, with proper postage prepaid, to the name and address set forth on the application for permit;

(4) If such notice is not served upon the applicant or permittee within seven (7) days of the date upon which the appeal was filed, then the denial shall be

deemed reversed.

b. Form of Appeals.

Any appeals filed pursuant to this ordinance shall state succinctly the grounds upon which it is asserted that the denial should be modified or reversed and shall be accompanied by copies of the application for permit, the written notice of the determination of the supervisor and/or the General Superintendent, and any other papers material to the determination.

c. Waiver of Requirements.

Any requirements for use fees, deposits, proof of insurance or premium for insurance may be waived by the General Superintendent upon the recommendation of the General Counsel, if the activity is protected by the First Amendment of the United States Constitution and the condition would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity. Fees for equipment and services may not be waived pursuant to this subsection. Application for a waiver shall be made on a form prescribed by the General Superintendent

Fines.

The violation by a permittee of the terms of his/her a permit or the laws and regulations of the Park District shall subject the permittee to a civil fine of up to $500. Each day that a violation continues shall be deemed a separate violation. Such fines may be assessed against any security deposit held by the Park District on behalf of the

permittee, pursuant to this chapter, Section C.4.d., above, or may be assessed a fine for monies in excess of any security deposit held by the Park District. Any assessment of fines in excess of any security deposit shall be subject to the appeal provisions of this chapter, Section C.6., above. The Region Manager or his/her designee shall give the permittee prompt written notice of any fines to be assessed in excess of the security deposit. Such notice shall be served on the permittee by personal delivery, or by deposit in the United States mail, with proper postage prepaid to the name and address set forth on the application for permit

Severability.

If any provision of this ordinance or the application thereof to any person or circumstance be held invalid, the remainder of this ordinance and the application of such provision to other persons or circumstances shall not be affected thereby. The Park District reserves the power to amend or repeal this ordinance at any time; and all rights, privileges and immunities conferred by this chapter or by acts done pursuant hereto shall exist subject to such power.

(2)

Supreme Court, U.S.
FILED
MAR 5 2001
OFFICE OF THE CLERK

No. 00-1249

In the Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Counsel for the Respondent informs this Court that the Chicago Park District has no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the Chicago Park District.

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STATEMENT OF THE CASE

In accordance with Rule 24(g), the Chicago Park District (the "Park District") submits this statement to correct some of the factual inaccuracies in Petitioners' statement of the case and to add facts of relevance to this petition.

This case involves a facial challenge to the Code of the Chicago Park District governing permits for use of the Chicago parks.[1] The permit sections of the Park District Code apply equally to permits for picnics, corporate events, athletic events and "rallies." (§C.3.a - App. 91a-92a.[2]) Anyone who wants to secure exclusive use of a Park District property must apply for a permit. Anyone who seeks to conduct certain types of events, such as a sporting event, erecting a structure, or selling goods, must apply for a permit whether or not they seek exclusive use of the property. (*Id.*) And, anyone seeking to hold an event of more than fifty people must apply for a permit. (*Id.*) The requirement of a permit is necessary to allow the public at large free access to the parks which are held in stewardship for everyone, and to prevent multiple events from being scheduled on the same property at the same time.

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[1] Summary judgment was granted against Petitioners' "as applied" challenge on July 1, 1998 and was never appealed by Petitioners. In addition, the substituted plaintiffs were not denied a permit and cannot make an as applied challenge.

[2] Selected portions of the Park District Code are included in Petitioners' Appendix as 91a-101a and where appropriate will be cited as "App. ___."

The Code provides specific procedures and timelines for acting upon a permit application. The Park District must provide a written response within fourteen days of an application's filing, but if necessary, this time can be extended an additional fourteen days.[3] The Code sets forth specific grounds for denial of a permit, such as failing to submit a complete application or the required licenses and fees, or that the proposed event is illegal, dangerous, or in violation of Park District regulations. (§C.5.e - App. 96a-98a.) If a permit is denied, the denial must be in writing and must set forth the grounds for denial. (§C.5.e - App. 96a.) The denial must contain a proposal by which the applicant can cure any defects, and if a denial is based on a scheduling conflict, the denial must provide alternative locations or times. (*Id.*) An applicant may file an appeal with the Superintendent of the Park District within seven days of a permit denial, and that appeal must be decided, in writing, within seven days. (§6.a - App. 99a-100a.) The applicant may submit whatever information it deems appropriate with the appeal. (*Id.*) If the initial application is not denied or the appeal not ruled on within the proscribed times, the permit must be granted.[4]

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[3] Petitioners did not include the portion of the Code providing timelines for acting on an application, section C.5.c. However, the Magistrate reviewed the Code and found that it contained the fourteen day requirement. (App. 16a, n.2.)

[4] The Petition contains several inaccuracies regarding the permit process. Footnotes 3 and 4 are incorrect because the Code requires the Park District to "clearly set forth [in writing] the grounds upon which the permit was denied." (§C.5.e - (continued...)

MacDonald's initial application for a permit was denied in writing on March 12, 1999, eight days after it was submitted. (App. 18a.[5]) He filed an appeal with the Superintendent which was denied on March 24, 1997. (App. 19a.) On April 25, 1997, MacDonald filed suit and sought an emergency preliminary injunction. (App. 19a.) That initial request was denied on May 9, 1997 because of MacDonald's month long delay in seeking emergency relief. (App. 20a.)

Despite the fact that MacDonald was denied a permit, he held his rally in the Chicago parks on May 10 and 11, 1997. (App. 17a.) Approximately 5,000 people attended the rally. MacDonald did not file an application for a rally in August 1997, but sought an injunction allowing such a rally. The District Court issued a preliminary injunction on August 15, 1997, allowing MacDonald's rally to go forward. Although the Seventh Circuit Court of Appeals stayed that Order on August 26, 1997 (and eventually reversed the preliminary injunction), MacDonald was allowed to conduct his rally as scheduled.

(...continued)
App. 96a.) Contrary to Petitioners' statement in footnotes 5 and 6, the Code holds a permittee responsible only for damages "proximately caused" by him or her. (§C.4.c and d - App. 93a-95a.) Footnote 11 of the Petition is also incorrect as MacDonald was granted a permit for an August 1998 rally. (App. 21a, n.8.) A permittee is entitled to a hearing by a non-employee hearing officer in certain circumstances. (§C.4.d(2) - App. 94a-95a.)

[5] The Magistrate's April 27, 1998 Report and Recommendation, including factual findings, is contained in Petitioners' Appendix as 14a-54a, and the Magistrate's March 8, 1999 Report and Recommendation is found at 55a-74a.

In 1998, MacDonald filed applications for rallies in May and August. His request for a May rally was denied, but with alternative locations and dates suggested. MacDonald's application for an August rally was granted (although MacDonald decided not to hold that rally). (App. 21a, n.8.) MacDonald died on June 6, 1999. The Seventh Circuit allowed Petitioners to substitute as plaintiffs.

There were two evidentiary hearings on preliminary injunction motions at which evidence was introduced regarding the Park District's practices and procedures. The testimony established that the Park District had never sought to prevent a "spontaneous" rally from taking place and in fact allowed such rallies, even without a permit, on a regular basis. *Thomas v. Chicago Park District*, 227 F.3d 921, 926 (7th Cir. 2000). (App. 7a.)[6] As noted by the Seventh Circuit in its initial opinion, "there is nothing in the record to indicate that the Park District has ever intervened to stop a First Amendment rally in one of its parks due to the absence of a permit." *MacDonald v. Chicago Park District*, 132 F.3d 355 (7th Cir. 1997).[7]

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[6] The Seventh Circuit and District Court opinions are contained in Petitioners' Appendix and will be cited as "App. ___" in addition to the official reporter citation.

[7] The initial Seventh Circuit decision is under the caption of *MacDonald v. Chicago Park District*, whereas the subsequent Seventh Circuit decision and this Petition are under the caption of *Thomas v. Chicago Park District* because of MacDonald's death on July 6, 1999.

The Seventh Circuit Opinions

The Seventh Circuit's initial decision, reversing and vacating the issuance of a preliminary injunction, was based on the lack of irreparable harm to MacDonald because he was not denied the opportunity to speak (i.e. to hold his rally), and the lack of a probability of success on the merits. *MacDonald v. Chicago Park District*, 132 F.3d 355 (7th Cir. 1997). The case returned to the District Court and on March 29, 1999 the Park District was granted summary judgment. (App. 75a-90a.)

On the subsequent appeal, the Seventh Circuit addressed both the substantive merits and the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965). The Seventh Circuit upheld the District Court's determination that the Park District Code was content-neutral and did not contain "unbridled discretion." *Thomas v. Chicago Park District*, 227 F.3d 921, 924-26 (7th Cir. 2000). (App. 5a-7a.) The Court also held that access to judicial review through the Illinois common law writ of certiorari or a suit in federal court satisfy the requirements of *Freedman* where the ordinance is content neutral, does not require the regulatory authority to evaluate the content of the activity regulated, and does not "censor" speech. *Thomas*, 227 F.3d at 926-927. (App. 8a-9a.)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners set forth five questions upon which they seek review. None of these questions rise to the level of importance or present the type of judicial conflict requiring this Court to intervene.

I. THE COURT SHOULD NOT INTERFERE WITH THE LOWER COURTS' FINDINGS THAT THE PARK DISTRICT CODE DOES NOT CONTAIN UNBRIDLED DISCRETION.

Petitioners seek review on whether a permit ordinance can allow unfettered discretion to the decision maker. But, no one contends that it may. It is undisputed that an ordinance restricting speech cannot contain unfettered discretion that would allow the decision maker to discriminate against unpopular ideas. Both the District Court and the Seventh Circuit acknowledged this requirement. *MacDonald v. Chicago Park District*, No. 97 C 2963, 1999 WL 203288 at *4-5 (N.D. Ill. Mar. 30, 1999) (App. 83a.); *MacDonald*, 132 F.3d at 361; *Thomas*, 227 F.3d at 924-25 (App. 5a-6a).

Here, the District Court and Seventh Circuit examined the Code and held that it did not confer unfettered discretion to governmental officials. *Thomas*, 227 F.3d at 924-26 (App. 5a-7a); *MacDonald v. Chicago Park District*, No. 97 C 2963, 1999 WL 203288 at *4 (N.D. Ill. Mar. 30, 1999) (App. 84a-85a). Petitioners do not contend that either the Seventh Circuit or the District Court misinterpreted this legal maxim. Rather, Petitioners dispute how this maxim was applied to them. Thus, Petitioners now seek to have this Court review the propriety of the lower

courts' application of the general rule to the Code. This is not the function of a writ of certiorari and the Court should not grant certiorari on this issue. Supreme Court Rule 10.

II. THE SEVENTH CIRCUIT DID NOT HOLD THAT A FACIAL CHALLENGE IS INAPPROPRIATE.

Petitioners contend that the Seventh Circuit abridged the ability of a plaintiff to make a facial challenge to an unconstitutional statute or ordinance. This is simply a misreading of the opinion. The Seventh Circuit did not hold that a facial challenge to the Park District Code was improper. Rather, the Court specifically acknowledged that facial challenges are appropriate where a challenge is to a statute as written or where a statute is so broad as to risk improper application. *Thomas*, 227 F.3d at 923. (App. 2a.) (Relying on *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) and *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).) The Seventh Circuit also recognized the place of a facial challenge in its earlier opinion in this case. *MacDonald*, 132 F.3d at 361-362 (noting that a prior Seventh Circuit case "poses a substantial obstacle to MacDonald's ability to establish that section C(5)(e) is facially invalid").

The Seventh Circuit has not "abolished" facial challenges. It first addressed and rejected Petitioners' facial challenge, and only referred to an as applied remedy after it found that the Code is content neutral and does not allow unbridled discretion. *Thomas*, 227 F.3d at 926. (App. 7a.) The Seventh Circuit did not hold, and Respondent has never argued, that a facial challenge is unavailable or inappropriate to Petitioners here. The Seventh

Circuit simply found that any unconstitutional *application* of the Code could be remedied by an as applied challenge. Here, the Park District was granted summary judgment on Petitioners' as applied challenge.

III. THE COURT NEED NOT ADDRESS WHETHER THE CODE SHOULD BE ANALYZED AS A PRIOR RESTRAINT OR A TIME, PLACE AND MANNER RESTRICTION.

Contrary to Petitioners' argument, the Seventh Circuit did not ignore a prior restraint analysis. Rather, it held that whether the Code is analyzed as a content-neutral prior restraint is not determinative of its constitutionality. *Thomas*, 227 F.3d at 923-924. (App. 3a.) ("The historical referent of 'prior restraints' is censorship [citation omitted] which the administration of a park system does not much resemble.") Accordingly, the Seventh Circuit analyzed the Code in the same manner as did this Court in reviewing content neutral licensing regulations in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

In *Hill v. Colorado*, this Court recently applied such an analysis in addressing a statute that prohibited knowingly approaching an individual within 100 feet of a health care facility entrance for purposes of counseling or educating, without that person's consent. *Hill v. Colorado*, 530 U.S. 703 (2000). Although the Court found that the statute limited speech, it also found that the statute was content neutral. 530 U.S. at ___, 120 S. Ct. at 2494. The Court then analyzed the statute as a time, place and manner regulation. *Id.* The Court rejected plaintiffs'

argument that the ordinance should be analyzed as a prior restraint because the Colorado ordinance, like the Park District Code, does not prohibit any message and does not silence any speaker. *Id.* at 2499.

As the Seventh Circuit observed below, this Court has treated licensing laws as prior restraints only when they permit licensing authorities to restrain speech on the basis of its content. *Thomas v. Chicago Park District*, 227 F.3d at 926. (App. 9a.) In *Freedman v. Maryland* itself, the motion picture censorship statute at issue allowed a licensing authority to prohibit the exhibition of films that it found to be "obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes." 380 U.S. at 52, n.2. This Court also has applied prior restraint doctrine to licensing laws that are triggered by the sexually-oriented content of a licensee's speech. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Petitioners mischaracterize the holding of *FW/PBS* as requiring that a prior restraint analysis must be made *before* an ordinance can be analyzed as a time, place and manner restriction. (Petition at 18-20.) The Court did not reach a time, place and manner analysis in *FW/PBS* because it first determined that the regulation was otherwise deficient. 493 U.S. at 223. The two analyses go hand in hand, not necessarily seriatim. This Court has made clear that, "government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade or rally." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). If an ordinance is content neutral and limits the time for issuing a decision, it is properly

analyzed as a time, place and manner restriction. *Ward v. Rock Against Racism*, 491 U.S. at 791. ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech [and are narrowly tailored]'.") *See also*, *Forsyth County*, 505 U.S. at 130. *FW/PBS* and the Court's other decisions require that prior restraints contain procedural safeguards and reasonable time, place and manner restrictions, but they do not hold that a content neutral ordinance cannot be analyzed as a time, place and manner restriction.

IV. THIS CASE DOES NOT IMPLICATE THE SPLIT BETWEEN CIRCUITS ON *FREEDMAN* REQUIREMENTS BECAUSE IT IS NOT A "CENSORSHIP" OR ADULT LICENSING CASE.

The Seventh Circuit held that for a non-censorship, content neutral licensing ordinance, the Illinois common law writ of certiorari and access to prompt review in the federal courts are sufficient procedural safeguards under *Freedman v. Maryland* and *FW/PBS*. The Seventh Circuit limited its holding to "a regulation of expressive activity when the regulation is not a form of censorship, that is, does not require or permit the regulatory authority to evaluate the content or message of the activity regulated." *Thomas v. Chicago Park District*, 227 F.3d at 926. (App. 8a.) This holding is not inconsistent with the decisions of this Court, or of the other Circuits.

Petitioners argue that the Code is invalid because it fails to provide procedural protections that must accompany prior restraints as identified by this Court in

Freedman and *FW/PBS*. As this Court has recently observed, there is a split in the circuits on whether the doctrine articulated in these cases requires a law licensing sexually-oriented businesses to assure a prompt decision on the merits by a judicial officer or "an avenue for prompt judicial review." *See City News & Novelty, Inc. v. City of Waukesha*, No. 99-1680, slip op. at 1-2 (U.S. Jan. 17, 2001). (*See also* Petition at 10-16.) But this case does not present the question on which the circuits have split, because the regulation at issue here is not triggered by the content of speech, as the Seventh Circuit correctly concluded. *Thomas*, 227 F.3d at 927-928. (App. 11a-12a.)

Nearly all of the decisions in other circuits on which Petitioners rely in positing a conflict on the meaning of "prompt judicial review" present a different issue under First Amendment prior restraint analysis, for precisely the reason identified by the Seventh Circuit. Those cases involved regulation of businesses disseminating sexually-oriented materials, and thus, as the court of appeals observed, "[t]he government's evident concern with the content of the 'speech' disseminated by such businesses argues for greater judicial vigilance . . . ." *Thomas*, 227 F.3d at 927. (App. at 11a.).[8] While there may be a split between the circuits on what procedural safeguards are necessary in the context of an adult business licensing scheme, this is not that case.

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[8] *See 11126 Baltimore Blvd., Inc. v. Prince George's County Md.*, 58 F.3d 988 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1010 (1995) (adult bookstore); *East Brooks, Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 277 (1995) (adult business); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) (adult bookstore).

Petitioners rely on only two decisions not involving the regulation of sexually-oriented speech, and those cases do not establish a conflict in the circuits on the question presented here. In *MacDonald v. Safir*, 206 F.3d 183 (2d Cir. 2000), the plaintiff challenged the constitutionality of New York City's parade permit ordinance. The Second Circuit did no more than observe that questions of fact existed about whether the state-court remedy available to those whose permit applications had been denied was sufficient to provide the requisite opportunity for prompt judicial review. *Id.* at 194-95. The court also observed that permitting officials might be obligated under *Freedman* to bear the burden of initiating judicial proceedings to enforce the denial of an application, but only if in future proceedings the plaintiff was able to establish that under the ordinance at issue the discretion granted to officials was sufficiently broad to allow them to act on the basis of the content of speech. *Id.* at 195. These highly provisional holdings establish nothing with sufficient clarity to amount to a conflict with the Seventh Circuit's decision in this case.[9]

In *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), the court considered the validity of several ordinances governing event permits, street closing permits, and sound amplification permits. The Eleventh Circuit held that under *Freedman*, the municipality was required to bear the burden of initiating judicial proceedings to enforce the denial of a street closing permit application. *Id.* at 774-76. However, the street closing ordinance applied to virtually any demonstration—it required a permit whenever persons "assemble or congregate in crowds in such numbers as to block the use of any sidewalk or street of the City. . . ." *Id.* at 773, n.17 (quoting Gainesville Code § 23-42). The ordinance at issue in *Safir* was even broader, applying to any parade or procession in a street or other public place. *MacDonald v. Safir*, 206 F.3d at 186. And permits under each of those two ordinances affected the availability of speech, not just the time and place.

[9] In *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999), involving a park permit regulation, the Second Circuit's decision was in accord with the Seventh Circuit here, and does not present any conflict.

The Park District Code, in contrast, applies to a wide variety of events and activities, only some of which are protected, and requires a permit only for the use of public parks for events involving more than fifty persons, and only if exclusive use of the park is required. (App. 91a.) The Seventh Circuit noted that, "[i]t is not even clear that the regulation reduces the amount of speech." *Thomas*, 227 F.3d at 924. (App. 3a.) As the Seventh Circuit correctly observed,

> [A] permit requirement is a sine qua non of managing a park system in a way that will preserve the value of parks for the general public. Parks are primarily for recreation rather than for political and ideological agitation. They cannot be preserved in the primary use for which they are intended if any group can hold a rally of any size and length at any time with amplified sound of any volume.

Thomas, 227 F.3d at 924. (App. 4a.) This Court has taken a similar view of the propriety of regulations that pre-

serve public parks for their primary purpose. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-99 (1984).

Under the facts of this case, the Seventh Circuit held that an aggrieved applicant has two sources of judicial review. In Illinois, administrative actions are reviewable by means of a proceeding for common law certiorari, containing the same review process as the state's administrative review act. *Thomas v. Chicago Park District*, 227 F.3d at 926. (App. 8a-9a.) However, if an applicant requires a more expeditious ruling, or is dissatisfied with the state review process, the applicant can do what MacDonald did here and the plaintiffs in many of the other cited cases have done: bring suit in federal court and seek emergency relief. *Thomas*, 227 F.3d at 927. (App. 10a.)

MacDonald's motion for temporary restraining order was heard and ruled on within fifteen days of filing. Petitioners, and other applicants, are assured of at least a preliminary judicial review by the protections offered by the Federal Rules of Civil Procedure, and similar state rules. Although a ruling on a motion for preliminary injunction is not a final adjudication, the standard is lower than would be required for an applicant to ultimately prevail. *See Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001) (preliminary injunction requires only a likelihood of success on the merits). And, at least in the context of the Park District Code, once an applicant obtains a preliminary injunction, his or her event can take place. Here, Petitioners held their rally even though the preliminary injunction was ultimately reversed. If anything, judicial review through state and

federal injunction remedies provides a lower standard and more protection to a potentially aggrieved applicant.

The Park District Code applies only to a limited and special category of public property and lacks the much broader inhibitory effects that led the Eleventh Circuit to characterize the permit ordinance at issue in *Cannabis Action Network* as a prior restraint subject to the *Freedman* safeguards. The Eleventh Circuit held in *Cannabis Action Network* that the *Freedman* requirement that the licensing authority bear the burden of initiating judicial proceedings applied to the municipal ordinance at issue in that case. However, it is far from clear that the Eleventh Circuit would reach the same result in a case like this one, involving an ordinance that endeavors to preserve the public parks for their primary intended uses, but leaves applicants free to demonstrate elsewhere. There is no square conflict between the decision below and the decisions in *Cannabis Action Network* or *Safir*, and for that reason this case does not warrant this Court's plenary review.

CONCLUSION

This Court should not grant certiorari here because the Seventh Circuit ruling is consistent with the prior decisions of this Court and is not inconsistent with decisions of the other Circuits. There is no reason why this Court should act as an additional appellate level in reviewing whether the Code contains "unbridled discretion." The Seventh Circuit's application of facial challenges and the prior restraint/time, place and manner analyses is completely in keeping with this Court's de-

cisions. And, to the extent that the Court seeks to resolve the conflict between the circuits on application of the *Freedman* safeguards, it should do so in the area where the conflict exists, licensing of adult oriented businesses.

The Petition should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The Chicago Park District claims that this Court need not be concerned about the split among the circuits on the issue of prompt judicial review when a case involves core political speech. Like the court below, it suggests that political speakers, often espousing views at extreme odds with the very governmental agencies that control their ability to appear in public fora, do not need *Freedman*'s protections. The Park District would have this Court leave intact the Seventh Circuit's opinion reserving *Freedman*'s procedural safeguards for only sexually explicit speech.

Aside from being a horrible proposition of law, the Park District's position is in error. *Freedman* has long been applied to core political speech cases by this Court, as well as many others. Some, however, like the court below, have sought to restrict its application. These differing results beg for this Court's resolution.

I. THE CONFLICT AMONG THE CIRCUITS IS NOT LIMITED TO ADULT ENTERTAINMENT LICENSING CASES

The Park District concedes, as it must, that there is a split among the circuits on the application of the procedural safeguards mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965) and reiterated in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). However, it claims those safeguards do not apply to situations involving political speech, but only to cases involving sexually-oriented "adult" businesses, purportedly relying upon this Court's recent statements in *City News & Novelty, Inc. v. City of Waukesha*, ___ U.S. ___, 121 S Ct 743 (2001). Park Dist. Brief at 11.

To the contrary, the *Freedman* doctrine was always meant to apply to all manner of speech cases. The Fifth Circuit struck the Dallas-Fort Worth International Airport solicitation ordinance because it failed to include *Freedman*'s procedural safeguards. *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. denied*, 458 U.S. 1124 (1982). The First Circuit applied the same *Freedman* requirements to religious handbilling in *Jews for Jesus, Inc. v. Mass. Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993). *Freedman* was the issue in two Second Circuit cases cited to the Court in the Petition, both involving core political speech virtually identical to that involved in this case: *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999) and *MacDonald v. Safir*, 206 F.3d 183 (2nd Cir. 2000). The Eleventh Circuit applied *Freedman* in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), another core political speech case. The court below is at odds with all of these cases when it seeks to restrict *Freedman* procedures to adult entertainment.

And the conflict continues to grow. In a recent decision, the United States District Court for the Middle District of Florida discussed the Seventh Circuit's opinion in this case. In *Florida Cannabis Action Network, Inc. v. City of Jacksonville*, 2001 WL 245714 (M. D. Fla., March 8, 2001) the Court said:

> The City cites a recent decision by a panel of the Seventh Circuit in *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000) as supporting the proposition that the *Freedman* safeguards should be limited to licensing regimes that censor specific content, such as adult entertainment.
>
> * * *

> Although *Thomas* presented facts and circumstances similar to this case, this Court respectfully disagrees with the Seventh Circuit's reasoning in that decision. . . . More importantly, the *Thomas* decision is inconsistent with the Eleventh Circuit's holding in [*Cannabis Action Network, Inc. v.*] *City of Gainesville*, which is binding authority on this Court.
>
> 2001 WL 245714 at *7-8 (footnote omitted).

There is yet another case involving core political speech in a traditional public forum, again from the Seventh Circuit, involving these same Petitioners, and these same issues. On March 12, 2001 the Seventh Circuit decided *MacDonald v. City of Chicago*, 2001 WL 241591 (7th Cir. 2001), upholding Chicago's parade permit ordinance. With a partial dissent, the panel concluded that the ordinance satisfied *Freedman*, even though it did not provide for prompt judicial disposition, did not require the City to initiate judicial review and did not require the City to bear the burden of proof in that proceeding. The court noted the conflict among the circuits:

> The circuits are split on this issue. The Fourth, Sixth and Ninth Circuits have held that prompt judicial review requires a prompt decision on the merits. *11126 Baltimore Blvd.*, 58 F.3d at 1000-01 ("prompt judicial review" requires "prompt judicial determination"); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892 (6th Cir. 2000) ("[T]his Circuit and a number of other circuits have held that a licensing scheme must reasonably ensure a prompt judicial determination, and not mere access to judicial

review."); *Baby Tam & Co., Inc.*, 154 F.3d at 1101 ("'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer"). Conversely, the First, Fifth and Eleventh Circuits have held that for permit and licensing ordinances, prompt judicial review only requires access to prompt judicial review. *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993) ("prompt judicial review" is provided where applicant may appeal license denial in court); *TK's Video, Inc.*, 24 F.3d at 709 (holding that ordinance which gives an unsuccessful license applicant 30 days to appeal to the district court satisfies the "prompt judicial review requirement"); *Boss Capital, Inc.*, 187 F.3d at 1256 (for licensing ordinances, prompt judicial review only means access to prompt judicial review)./6

2001 WL 241591 at *13.

In footnote 6 the panel said:

It is unclear exactly where the Second Circuit stands. Compare *Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999) ("prompt access to judicial review in state courts would satisfy *Freedman*") (emphasis added), with *MacDonald v. Safir*, 206 F.3d 183 (2d Cir. 2000) (noting that *Beal* held that "prompt access to judicial review in state courts would satisfy *Freedman*," but concluding that the record was insufficient to determine whether available state court proceedings satisfied that requirement).

2001 WL 241591 at *13, n. 6 [1]

The split among the circuits is having an ongoing and serious impact on core political speech in traditional public fora, and needs to be resolved by this Court at the earliest possible time.

II. THIS COURT MUST CONFIRM THAT CONDITIONING SPEECH UPON RECEIPT OF A GOVERNMENT PERMIT IS A PRIOR RESTRAINT

The court below and the Park District contend that an ordinance requiring one to obtain a permit before speaking in a public park or on the public ways is a prior restraint only when it explicitly permits licensing authorities to restrain speech on the basis of its content. *Thomas v. Chicago Park District*, 227 F.3d 921, 926 (7th Cir. 2000); Petition for Certiorari, App. 9a; Respondent's Brief, p. 9. This "formulation" is not correct. It is a distortion of this Court's holdings.

Any governmental regulation which requires a speaker to obtain governmental permission before speaking is a prior restraint. *Shuttlesworth v. City of Birmingham*, 394

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1. The Seventh Circuit panel, in concluding that it was in line with the Eleventh Circuit, failed to mention the opinion in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F 3d 761 (11th Cir 2000). That case said the issue of what constitutes prompt judicial review is unresolved in the Eleventh Circuit in core political speech cases. Petitions for certiorari will be filed in both *Cannabis Action Network* and *MacDonald v. City of Chicago*.

U.S. 147 (1969); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1976). Several circuits have explicitly held that any scheme which allows the government to either allow or deny an individual access to be heard in a public forum is a prior restraint. *Beal v. Stern,* 184 F.3d 117 (2nd Cir. 1999); *Nightclubs, Inc. v. Paducah*, 202 F.3d 884 (6th Cir. 2000); *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981).

While the Park District contends that the Court of Appeals correctly applied a time, place and manner analysis to this situation, the decision below is directly in conflict with these cases, as well as many others. The Court of Appeals for the Seventh Circuit is not as sanguine regarding the correctness of its position as is the Park District. In a subsequent divided decision in another case presenting many of these same issues, involving the same Plaintiffs, the Court specifically reiterated its confusion. *MacDonald v. City of Chicago, supra*. Despite holding that an ordinance which does not place unfettered discretion in the hands of government officials is not a prior restraint, the Court alluded to its previous fractured decision in *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (en banc), and all but asked this Court to grant the Petition in this case to resolve that confusion:

> In recognition of the continuing discussion and debate in the courts and in the legal community at large, Judge Ripple's concurrence noted that "there is a great need for clarification of standards in this area, and I respectfully suggest that this case is deserving of further review in the Supreme Court of the United States. [9 F.3d] at 1335. Although the Court did not review *Graff*, the Court's decisions since then have also not resolved the conflicting analyses.

> *MacDonald v. City of Chicago, supra*, 2001 WL 241591 at *8, n. 4.

This Court should grant the Petition for Certiorari in this case to settle, once and for all, what constitutes a governmental prior restraint on speech.

III. THE PARK DISTRICT'S ACTIONS IN THIS CASE DEMONSTRATE THE NECESSITY FOR FACIAL CHALLENGES TO PERMIT SCHEMES

In *Nationalist Movement v. Forsyth County*, 505 U.S. 123 (1992), this Court said "a government regulation that *allows* arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the *potential* for becoming a means of suppressing a particular point of view.'" 505 U.S. at 130 (emphasis added).

In an apparent attempt to convince this Court that political speech is not subject to censorship in Chicago, Respondent asserts that its permit procedure applies only to a "limited and special category of public property" and that it has never sought to prevent a "'spontaneous' rally from taking place, and has in fact allowed such rallies, even without a permit, on a regular basis." (Respondent's Brief in Opposition, pp. 4, 15). Although it was invited to support such a claim, and given an ample opportunity to do so, both the Magistrate Judge and the District Judge found that the Park District failed to present any evidence that it had a practice favoring free speech in the parks. Magistrate Judge Keys found:

> Thus, despite Judge Marovich's Order for the submission of additional evidence, and despite claiming that a hearing was unnecessary, the Park District basically has provided no new evidence to demonstrate a "well-established practice" narrowing construction of the Ordinance. . . . Finally, the Park District's own 12(M)(and Affidavits of Joan Fencik) failed to show evidence that demonstrates a historical practice in its interpretation of the Ordinance, and instead merely parroted the language of the Ordinance or the words "established practice", without providing any context. Therefore, this Court must conclude that there is no well-established practice limiting application of the Ordinance. (Petition for Certiorari, Appendix 62a-63a).

The District Court was even more pointed in its assessment of the Park District's failure to support its claims:

> Magistrate Judge Keys complained about the "dearth of evidence" on this point despite the "numerous opportunities given to the Park District to provide this critical information." . . . This Court must echo Magistrate Judge Keys' frustrations with the Park District on this point. From what this Court can glean, the Park District has gone out of its way to ignore several of the orders of this Court and Magistrate Judge Keys. . . . It should be noted that the present outcome is in spite of, not because of, the Park District's vexatious course of conduct before the Magistrate Judge and this Court. (Petition for Certiorari, Appendix 86a)

A comparison of the Park District's assertion that it freely allows rallies and political demonstrations with its adamant refusal to cooperate in providing any proof of that claim graphically demonstrates why facial challenges to these kinds of permit schemes are necessary if First Amendment protections are to have any meaning. The Park District's conduct in this case illustrates the continuing validity of this Court's observation in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988), that governments often engage in "post hoc rationalizations . . . and the use of shifting or illegitimate criteria . . . making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." In her dissent in *MacDonald v. City of Chicago*, *supra*, Judge Rovner expresses this concern, noting that under Chicago's parade ordinance, the City may surreptitiously suppress unfavorable speech despite the "content neutrality" of its provisions. 2001 WL 241591 at *15. It is because governments consistently engage in such chicanery that facial challenges are necessary to protect our basic freedoms. Such challenges are not merely "semantic nit-picking and judicial usurpation of the legislative drafting function" as the Court of Appeals in this case claims (Petition for Certiorari, Appendix 4a-5a), but the only way the courts have of preventing the irreparable injury which inevitably results from governmental attempts to delay citizens' rights to speak publicly when and where they deem it most efficacious. See *Elrod v. Burns*, 423 U.S. 347 (1976).

CONCLUSION

Petitioners readily acknowledge that the Chicago Park District has the "the power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v.*

Florida, 385 U.S. 39, 47 (1966)). However, that power must be exercised within constitutional limits, and must always be extremely sensitive to the needs of those engaged in core political speech when the property is a public forum. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Hague v. CIO*, 307 U.S. 496 (1939); *Shuttlesworth v. City of Birmingham*, 394 U.S.147 (1969). The Park District's claim that its ordinance "endeavors to preserve the public parks for their primary intended uses, *but leaves applicants free to demonstrate elsewhere*," is an insult to the First Amendment and all it represents.[2] That claim must be soundly rejected. This Court should grant review in this case.

Respectfully submitted,

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---

2. Apparently the Park District disagrees with this Court's statements that "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

Supreme Court, U.S.
FILED
2001

No. 00-1249

In the
Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 30, 2001
CERTIORARI GRANTED MAY 29, 2001

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U.S. District Court
Northern District of Illinois (Chicago)

CIVIL DOCKET FOR CASE #: 97-CV-2963

MacDonald v. Chgo Pk Dist
Filed: 04/25/97
Assigned to: Hon. George M. Marovich
Demand: $0,000
Nature of Suit: 440
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

ROBERT MACDONALD plaintiff	Gregory Nathan Freerksen Wayne B. Giampietro Witwer, Poltrock & Giampietro 125 South Wacker Drive Suite 2700 Chicago, IL 60606 (312) 332-6000 Richard J. Wilson Attorney at Law 3610 Dubsdred Circle Orlando, FL 32004 (407) 649-9225

v. CHICAGO PARK DISTRICT, a body
political and corporate,

defendant

Steven A. Weiss
Kevin Thomas Kerns
Schopf & Weiss
312 West Randolph
Street
Suite 300
Chicago, IL
60606-1721
(312) 701-9300

Docket as of November 20, 2000 10:34 pm

Proceedings include all events.
TERMED
1:97cv2963 MacDonald v. Chgo Pk Dist
KEYS

4/25/97	1	COMPLAINT - Civil cover sheet - Appearance(s) of Richard J. Wilson, Wayne B. Giampietro, Gregory Nathan Freerksen as attorney(s) for Robert MacDonald (Original and one copy of summons(es) issued.) (Documents: 1-1 through 1-3) (ar) [Entry date 04/29/97]
4/25/97	--	RECEIPT regarding payment of filing fee paid; on 4/25/97 in the amount of $ 150.00, receipt # 492102. (ar) [Entry date 04/29/97]

4/25/97	2	EMERGENCY APPLICATION by plaintiff for preliminary injunction; Notice of motion (ar) [Entry date 05/01/97]
4/25/97	3	MEMORANDUM of law by plaintiff in support of emergency application for preliminary injunction [2-1] (ar) [Entry date 05/01/97]
4/29/97	4	ATTORNEY APPEARANCE for Chgo Pk Dist by Steven A. Weiss, Kevin Thomas Kerns (ar) [Entry date 05/01/97]
5/2/97	5	VERIFIED ANSWER by Chgo Pk Dist and affirmative defenses; Notice of filing (ar) [Entry date 05/06/97]
5/2/97	6	MOTION by defendant to strike or deny plaintiff's emergency motion for preliminary injunction or to compel deposition (Attachments); Notice of motion (ar) [Entry date 05/06/97]
5/2/97	7	WITNESS list by defendant; Notice of filing (ar) [Entry date 05/06/97]
5/2/97	--	ORAL MOTION by defendant to file their response to plaintiff's emergency application for preliminary

injunction in excess of 15 page, but limited to 25 pages (ar)
[Entry date 05/06/97]

5/2/97 8 MINUTE ORDER of 5/2/97 by Hon. Arlander Keys : Defendant's motion to strike [6-1] or deny plaintiff's emergency motion for preliminary injunction [6-2] or to compel deposition [6-3] is granted in part and denied in part. Plaintiff is to be made available for deposition of 05/05/97 at 10:00 am. Defendant's response to plaintiff's emergency application [2-1] for preliminary injunction is due 5/5/97 and hearing on said motion [2-1] is set for 05/06/97 at 9:00 am. Both parties are to submit their witness lists no later than 05/02/97. Oral motion by defendant to file their response to plaintiff's emergency application for preliminary in excess of 15 pages, but limited to 25 pages [0-1] is granted. Mailed notice (ar) [Entry date 05/06/97]

5/5/97 10 MEMORANDUM by defendant in opposition to motion for preliminary injunction [2-1]; Notice of filing (ar) [Entry date 05/08/97]

5/6/97 -- SCHEDULE set on 5/6/97 by Hon. George M. Marovich : Status hearing set for 6/17/97 at 9:30 am Mailed notice (js) [Entry date 05/06/97]

5/6/97 9 MINUTE ORDER of 5/6/97 by Hon. Arlander Keys : Hearing on plaintiff's emergency application for preliminary injunction [2-1] held and concluded. Ruling to be made by mail. Plaintiff's motion to admit Richard Wilson, 3610 Dubsdread Circle, Orlando, Florida 32004, pro hac vice is granted. Mailed notice (ar) [Entry date 05/08/97] [Edit date 05/08/97]

5/6/97 11 STIPULATION by plaintiff regarding user fee, security deposit and insurance requirements of the Chicago Park District; Notice of filing (ar) [Entry date 05/08/97]

5/6/97 12 MOTION by plaintiff to admit counsel pro hac vice (ar) [Entry date 05/08/97]

5/6/97 13 AFFIDAVIT of Richard L. Wilson regarding plaintiff's motion to admit counsel pro hac vice [12-1] (ar) [Entry date 05/08/97]

5/7/97	14	REFERRAL ORDER of 05/06/97: Referring to Hon. Arlander Keys pursuant to General Rule 2.41(b) to conduct hearings and enter appropriate orders on the following pretrial motion/matter: to perform such additional duties as are not inconsistent with the Constitution and laws of the United States, specifically, prepare a report and recommendation on plaintiff's emergency motion for preliminary injunction [2-1]. (For further detail see order.) Mailed notice (ar) [Entry date 05/12/97]
5/8/97	--	MAILED Rule 3.12 instruction and pro hac vice form to Richard J. Wilson together with copy of minute order dated 05/06/97 [9-1] (ar) [Entry date 05/08/97]
5/9/97	15	REPORT AND RECOMMENDATION regarding plaintiff's emergency application for preliminary injunction [2-1] (ar) [Entry date 05/12/97]
5/9/97	16	MINUTE ORDER of 5/9/97 by Hon. Arlander Keys : Report and Recommendation regarding plaintiff's emergency application for preliminary injunction [2-1], pursuant to Federal Rule

		of Civil Procedure 65, is hereby submitted to Judge Marovich. All matters relating to the referral of this action having been resolved, the case is returned to the assigned District Judge. Terminating case referral. Mailed notice (ar) [Entry date 05/12/97]
5/21/97	--	SCHEDULE set on 5/21/97 by Hon. George M. Marovich : Status hearing date of June 17, 1997 is reset to 7/1/97 at 9:30 am. Mailed notice (js) [Entry date 05/21/97]
5/23/97	17	SECOND APPLICATION by plaintiff for preliminary injunction ; Notice of motion (eav) [Entry date 05/30/97]
5/28/97	--	SCHEDULE set on 5/28/97 by Hon. Arlander Keys : Status hearing set to 9:00 5/29/97. Telephoned notice (vkd) [Entry date 05/28/97]
5/28/97	18	MINUTE ORDER of 5/28/97 by Hon. George M. Marovich : Plaintiff's second application for preliminary injunction is referred to the magistrate judge for a report and recommendation [17-1], [2-1] Telephoned notice (eav)

[Entry date 05/30/97]

5/29/97 19 MINUTE ORDER of 5/29/97 by Hon. Arlander Keys : Status hearing held and continued to - 07/14/97 at 9:00 a.m. Plaintiff to file its memorandum in support of its second application for preliminary injunction by 06/12/97. Defendant's response due 06/27/97. [17-1], [2-1] Reply, if any, due by 07/07/97. No notice (eav) [Entry date 05/30/97]

5/30/97 20 REFERRAL ORDER of 05/28/97: Case referred to Magistrate Judge Arlander Keys pursuant to local General Rule 2.41(b) to conduct hearings and enter appropriate orders on the following pretrial motion/matter: Perform such additional duties as are not inconsistent with the Constitution and laws of the United States, Prepare a report and recommendation on plaintiff's second application for a preliminary injunction. (For further details see order.) Mailed notice (eav) [Entry date 06/02/97]

5/30/97 21 MINUTE ORDER of 5/30/97 by Hon. George M. Marovich : No objections having been filed to the

magistrate judge's report and recommendation of 05/09/97, the court hereby adopts the magistrate-judge's report and recommendation. Plaintiff's emergency application for preliminary injunction is denied. [2-1] Status hearing date of 06/17/97 is stricken pending disposition of the second motion for preliminary injunction. Mailed notice (eav) [Entry date 06/03/97]

6/12/97 22 MOTION by plaintiff for leave to file memorandum in excess of fifteen pages ; Notice of motion (eav) [Entry date 06/16/97]

6/13/97 23 MINUTE ORDER of 6/13/97 by Hon. Arlander Keys: Plaintiff's motion for leave to file memorandum in excess of fifteen pages is granted. [22-1] Plaintiff's supplemental memorandum of law in support of amended second application for preliminary injunction is not to exceed twenty-five pages. Defendant's response is not to exceed twenty-five pages. Mailed notice (eav) [Entry date 06/16/97]

6/13/97 24 SUPPLEMENTAL MEMORANDUM by plaintiff of law in support of

amended second application for preliminary injunction (Exhibits) (eav) [Entry date 06/16/97]

7/1/97 25 JOINT EMERGENCY MOTION by plaintiff, defendant to reset briefing schedule (Attachments); Emergency notice of motion (eav) [Entry date 07/03/97]

7/2/97 26 CONSENT to exercise of jurisdiction by a United States Magistrate to hear motion for preliminary injunction by plaintiff, defendant (eav) [Entry date 07/03/97]

7/2/97 27 MINUTE ORDER of 7/2/97 by Hon. Arlander Keys : Joint emergency motion to reset briefing schedule is granted. [25-1] Defendant's response to plaintiff's second motion for preliminary injunction is due by close of business on 7/3/97. [17-1] Reply is due 7/11/97. Mailed notice (eav) [Entry date 07/03/97]

7/3/97 28 MEMORANDUM by defendant in opposition to second motion for preliminary injunction [17-1] (Attachments); Notice of filing (eav) [Entry date 07/07/97]

7/11/97 29 REPLY memorandum of law by

plaintiff Robert MacDonald in support of amended second application for preliminary injunction [17-1] (Attachment); Notice of filing (cmf) [Entry date 07/14/97]

7/14/97 -- ORAL MOTION by defendant for leave to file a sur-reply (eav) [Entry date 07/16/97]

7/14/97 30 MINUTE ORDER of 7/14/97 by Hon. Arlander Keys : Status hearing held. Over plaintiff's objection, defendant's oral motion [0-1] for leave to file a sur-reply to plaintiff's amended second application for preliminary injunction [17-1] by 7/17/97 is granted. Hearing on plaintiff's application [17-1] set for 7/21/97 at 10:00 a.m. No notice (eav) [Entry date 07/16/97]

7/17/97 31 SUR-REPLY by defendant in opposition to second motion for preliminary injunction [17-1]; Notice of filing (eav) [Entry date 07/18/97]

7/21/97 32 MINUTE ORDER of 7/21/97 by Hon. Arlander Keys : Hearing held and concluded on plaintiff's amended second application for preliminary injunction [17-1]. Said motion is taken under advisement. Ruling to

	be made by mail. No notice (eav) [Entry date 07/22/97]
7/23/97 33	TRANSCRIPT of proceedings for the following date(s): 5/2/97 Before Honorable Arlander Keys (eav) [Entry date 07/24/97]
7/25/97 34	STIPULATION of facts (Exhibits); Notice of filing (eav) [Entry date 07/28/97]
8/14/97 35	TRANSCRIPT of proceedings for the following date(s): 05/29/97 before Honorable Arlander Keys (nln) [Entry date 08/14/97]
8/15/97 36	MEMORANDUM, OPINION, AND ORDER (vkd) [Entry date 08/15/97]
8/15/97 37	PRELIMINARY INJUNCTION ORDER (vkd) [Entry date 08/15/97]
8/15/97 38	MINUTE ORDER of 8/15/97 by Hon. Arlander Keys: Enter memorandum opinion and order. Plaintiff's Second Application for Preliminary Injunction [17-1] is granted in part and denied in part. Enter Preliminary Injunction Order. (For further detail see order). No notice (vkd) [Entry date 08/15/97] [Edit date 08/18/97]
8/15/97 --	SCHEDULE set on 8/15/97 by Hon.

	Arlander Keys : Status hearing set for 8/19/97 at 10:30 a.m. No notice (vkd) [Entry date 08/15/97]
8/15/97 39	NOTICE of posting bond by plaintiff (nln) [Entry date 08/18/97]
8/15/97 40	EMERGENCY MOTION by defendant reconsider the preliminary injunction order entered by the court on 08/15/97 and amend the preliminary injunction order entered by this court on 08/15/97 and for stay pending appeal; Emergency notice of motion (nln) [Entry date 08/18/97]
8/15/97 41	MINUTE ORDER of 8/15/97 by Hon. Arlander Keys : Defendant's emergency motion to reconsider the preliminary injunction order entered by the court on 08/15/97 [40-1], amend the preliminary injunction order entered by this court on 08/15/97 [40-2] and for stay pending appeal is denied pursuant to discussions held in open court [40-3]. The defendant will submit to the court by close of business 08/18/97 a memorandum discussing its concerns regarding the handling of future applications for permits. Mailed notice

(nln) [Entry date 08/18/97]

8/15/97 43 – NOTICE OF APPEAL by defendant from motion minute order [38-1], from order [37-1], from order [36-1] ($105.00 Paid) (cmf) [Entry date 08/19/97] [Edit date 08/19/97]

8/18/97 42 SUPPLEMENT by defendant (Attachments) (nln) [Entry date 08/19/97]

8/19/97 44 LETTER regarding docketing statement acknowledged by defendant. (cmf) [Entry date 08/19/97]

8/19/97 -- TRANSMITTED to the 7th Circuit the short record on appeal . Mailed notice to all counsel. (cmf) [Entry date 08/19/97]

8/19/97 SCHEDULE set on 8/19/97 by Hon. Arlander Keys : Status hearing held and continued to 8/20/97 at 10:00 a.m. No notice (vkd) [Entry date 08/19/97]

8/19/97 45 RESPONSE by plaintiff to emergency motion to reconsider and amend; Notice of filing (nln) [Entry date 08/19/97]

8/19/97 46 PRELIMINARY INJUNCTION ORDER (ip) [Entry date 08/19/97]

8/19/97 47 MINUTE ORDER of 8/19/97 by Hon. Arlander Keys: Enter preliminary injunction order to amend and revise preliminary injunction order entered on 8/15/97. No notice (ip) [Entry date 08/19/97]

8/20/97 -- SCHEDULE set on 8/20/97 by Hon. Arlander Keys : Status hearing stricken. Telephoned notice (vkd) [Entry date 08/20/97]

8/21/97 48 EMERGENCY MOTION by defendant Chgo Pk Dist for stay pending appeal; Notice of Motion (vkd)Entry date 08/21/97]

8/21/97 49 ORDER (vkd) [Entry date 08/21/97]

8/21/97 50 MINUTE ORDER of 8/21/97 by Hon. Arlander Keys :Defendant Chicago Park District's Emergency Motion for Stay Pending Appeal [48-1] is denied. Enter Order. (For further detail see order). Mailed notice (vkd) [Entry date 08/21/97]

8/21/97 51 ORDER (Exhibits). (vkd) [Entry date 08/21/97]

8/21/97 52 MINUTE ORDER of 8/21/97 by Hon. Arlander Keys : Enter Order. (For further detail see order).Mailed notice (vkd) Entry date 08/21/97]

8/21/97 54	ACKNOWLEDGMENT of receipt of short record on appeal USCA 97-3106 (Attachment) (ar) [Entry date 08/22/97]
8/21/97 53	NOTICE OF APPEAL by defendant Chgo Pk Dist from motion minute order [47-1], from order [46-1], from motion minute order [38-1], from order [37-1], from order [36-1] $105.00 PAID) (da) [Entry date 08/26/97]
8/21/97 54	DOCKETING STATEMENT by defendant Chgo Pk Dist regarding appeal [53-1] . (da) [Entry date 08/26/97]
8/25/97 55	SEVENTH CIRCUIT transcript information sheet by defendant (eav) [Entry date 08/26/97]
8/26/97 --	TRANSMITTED to the 7th Circuit the short record on appeal . Mailed notice to all counsel. (da) [Entry date 08/26/97]
8/26/97 56	LIST OF TRIAL EXHIBITS by defendant (Exhibits); Notice of filing (eav) [Entry date 08/27/97]
8/29/97 57	TRANSCRIPT of proceedings for the following date(s): 8/19/97 Before Honorable Arlander Keys (eav) [Entry date 09/02/97]

8/29/97 58	ACKNOWLEDGMENT of receipt of short record on appeal USCA 97-3162 (Attachments) (eav) [Entry date 09/02/97]
8/29/97 59	CERTIFIED copy of Order from the 7th Circuit. (97-3162) (eav) [Entry date 09/02/97]
8/29/97 60	CERTIFIED copy of Order from the 7th Circuit. (97-3162) (eav) [Entry date 09/02/97]
9/2/97 --	TRANSMITTED to the 7th Circuit the long record on appeal no. 97-3106 & 97-3162 consisting two volumes of pleadings, three volumes of transcripts (item # 33, 35 & 57) of Mailed notice to all counsel. (da) [Entry date 09/02/97]
9/8/97 61	TRANSCRIPT of proceedings for the following date(s): 5/6/97, 7/21/97, 8/15/97 Before Honorable Arlander Keys (4 Vols.: 61-1 through 61-4) (eav) [Entry date 09/09/97]
9/9/97 --	TRANSMITTED to the 7th Circuit supplement to appeal no. 97-3162 consisting of four volumes of transcripts. Documents 61. Mailed notice to all counsel. (eav) [Entry date 09/09/97]

12/17/97 62	TRANSCRIPT of proceedings for the following date(s): 7/21/97, Before Honorable Arlander Keys (one volume) (eav) [Entry date 12/18/97]
12/18/97 --	TRANSMITTED on 12/18/97: to the 7th Circuit supplement to appeal no. 97-3106 and 97-3162 consisting of one transcript, document number 62. Mailed notice to all counsel. (eav) [Entry date 12/18/97]
1/16/98 63	CERTIFIED copy of Order from the 7th Circuit. It is hereby ordered that the petition for rehearing with suggestions for rehearing en banc be, and the same is, hereby Denied. (97-3106 & 97-3162) (eav) [Entry date 01/20/98]
1/23/98 64	OPINION from the 7th Circuit: Argued 10/9/97; Decided 12/12/97. (97-3106 & 97-3162) (eav) [Entry date 01/23/98]
1/23/98 65	CERTIFIED COPY of order from the 7th Circuit: The preliminary injunction issued by the District Court is vacated, in accordance with the decision of this court entered on this date. The Chicago Park District shall recover its costs. [53-1], [43-1] (97-3106 & 97-3162)

	(eav) [Entry date 01/23/98]
1/23/98 66	BILL OF COSTS submitted by U.S. Court of Appeals. Appeal nos. 97-3106 & 97-3162 (eav) [Entry date 01/23/98]
1/23/98 67	LETTER from the 7th Circuit returning the record on appeal no. 97-3106 & 97-3162 consisting of two volumes of pleadings and eight volumes of transcript (eav) [Entry date 01/23/98]
1/27/98 68	BILL OF COSTS submitted by defendant-appellant (Exhibits); Notice of filing (eav) [Entry date 01/28/98]
2/3/98 69	MOTION by plaintiff for second preliminary injunction and motion to consolidate the trial with the hearing on this motion (Exhibits); Notice of motion (eav) [Entry date 02/06/98]
2/5/98 70	MINUTE ORDER of 2/5/98 by Hon. George M. Marovich: Pursuant to USCA 7th Circuit order docketed on 1/23/98: Costs are taxed in favor of defendant Chicago Park District in the amount of $1,569.00. Mailed notice (eav) [Entry date 02/06/98]

2/6/98	71	MINUTE ORDER of 2/6/98 by Hon. George M. Marovich : Plaintiff's motion for a second preliminary injunction is referred to the designated magistrate-judge for a report and recommendation. [69-1] Plaintiff's motion to consolidate the trial with the hearing on the motion for a second preliminary injunction is denied. [69-2] Telephoned notice (eav) [Entry date 02/06/98]
2/6/98	72	MEMORANDUM by plaintiff in support of second motion for preliminary injunction and motion to consolidate the trial with the hearing on this motion [69-1] (eav) [Entry date 02/09/98]
2/6/98	--	ORAL MOTION by plaintiff to correct the event dates in its motion for second preliminary injunction to read 5/9/98 and 5/10/98 (eav) [Entry date 02/09/98]
2/6/98	73	MINUTE ORDER of 2/6/98 by Hon. Arlander Keys : Plaintiff's oral motion to correct the event dates in its motion for second preliminary injunction to read 5/9/98 and 5/10/98 is granted. [0-1] Defendant's cross-motion is to be filed by 3/6/98. Plaintiff's reply is due 3/16/98. [69-1] Status

		hearing set for 3/23/98 at 9:00 a.m. Mailed notice (eav) [Entry date 02/09/98]
2/11/98	74	REFERRAL ORDER of 2/6/98: Case referred to Magistrate Judge Arlander Keys pursuant to local General Rule 2.41(b) to conduct hearings and enter appropriate orders on the following pretrial motion/matter: Conduct necessary proceedings and enter Order/Report and Recommendation on all nondispositive pretrial motions through filing of pretrial materials including final pretrial order, prepare a report and recommendation on plaintiff's motion for a second preliminary injunction. (For further detail order.) Mailed notice (eav) [Entry date 02/12/98]
2/23/98	75	MINUTE ORDER of 2/23/98 by Hon. Arlander Keys: Status hearing held. Cross-motions for summary judgment with Rule 12(m) statements due 3/6/98. Responses due 3/16/98. Replies are due 3/20/98. Parties are given leave to file their briefs in excess of 15 pages but they are not to exceed 21 pages. Status hearing set for 3/23/98 at 9:00 a.m. to stand. Mailed notice (eav) [Entry date 02/24/98]

3/3/98	76	MOTION by plaintiff for leave to file instanter his amended memorandum in support of second motion for preliminary injunction; Notice of motion (dcap) [Entry date 03/09/98]
3/6/98	77	AMENDED MEMORANDUM by plaintiff in support of second motion for preliminary injunction [17-1] (dcap) [Entry date 03/09/98]
3/6/98	78	MINUTE ORDER of 3/6/98 by Hon. Arlander Keys : Plaintiff's motion for leave to file instanter his amended memorandum in support of second motion for preliminary injunction is granted [76-1] Mailed notice (dcap) [Entry date 03/09/98]
3/6/98	79	MOTION by defendant for summary judgment on plaintiff's facial challenge; Notice of filing (dcap) [Entry date 03/09/98]
3/6/98	80	MEMORANDUM by defendant in support of motion for summary judgment on plaintiff's facial challenge [79-1]; Notice of filing (dcap) [Entry date 03/09/98]
3/6/98	81	RULE 12 Statement by defendant in support of motion for summary judgment (Attachments); Notice of filing (dcap)

[Entry date 03/09/98]

3/6/98	82	MOTION by plaintiff for summary judgment (dcap) [Entry date 03/09/98]
3/6/98	83	MEMORANDUM of law by plaintiff in support of motion for summary judgment [82-1] (Attachment) (dcap) [Entry date 03/09/98]
3/6/98	84	RULE 12 Statement by plaintiff of uncontested facts (Exhibits); Notice of filing (dcap) [Entry date 03/09/98]
3/11/98	85	MOTION by defendant to enlarge and combine briefing schedule ; Notice of motion (eav) [Entry date 03/16/98]
3/13/98	86	MINUTE ORDER of 3/13/98 by Hon. Arlander Keys: Defendant's motion to enlarge and combine briefing schedule is granted. [85-1] Defendant is to file a supplemental motion for summary judgment on the as-applied challenge and respond to plaintiff's facial/as-applied motions by 3/30/98. Status hearing set for 3/23/98 at 9:00 a.m. is stricken. Mailed notice (eav) [Entry date 03/16/98]
3/30/98	87	MEMORANDUM by defendant in

opposition to MacDonald's third motion for preliminary injunction and [69-1] MacDonald's motion for summary judgment [82-1] (Attachments); Notice of filing (eav) [Entry date 03/31/98]

3/30/98 88 MOTION by defendant for summary judgment on plaintiff's as applied challenge ; Notice of filing (eav) [Entry date 03/31/98]

3/30/98 89 MEMORANDUM by defendant in support of motion for summary judgment on plaintiff's as applied challenge [88-1] (Attachments); Notice of filing (eav) [Entry date 03/31/98]

3/30/98 90 RULE 12(n) Statement on MacDonald's motion for partial summary judgment by defendant (Attachments); Notice of filing (eav) [Entry date 03/31/98]

4/7/98 91 MEMORANDUM by defendant in support of motion for involuntary dismissal due to plaintiff's nonpayment of costs (Attachments); Notice of filing (ip) [Entry date 04/08/98]

4/7/98 95 MOTION by plaintiff for involuntary dismissal due to plaintiff's nonpayment of costs; Notice of motion (eav) [Entry date 04/15/98]

4/8/98 92 REFERRAL ORDER of 4/7/98: Case referred to Magistrate Judge Hon. Arlander Keys pursuant to local General Rule 2.41(b) to conduct hearings and enter appropriate orders on the following pretrial motion/matter: Conduct necessary proceedings and issue Report and Recommendation on dispositive motion specified: Prepare a report and recommendation on the cross motions for summary judgment.
(For further details see order.)
Mailed notice (eav)
[Entry date 04/09/98]

4/9/98 93 RESPONSE by plaintiff to defendant's motion for involuntary dismissal (Exhibits); Notice of filing (eav) [Entry date 04/10/98]

4/10/98 94 TRANSCRIPT of proceedings for the following date(s):
2/23/98 Before Honorable Arlander Keys (eav)

4/13/98 96 MOTION by defendant for leave to file instanter amended memorandum in support of its motion for involuntary dismissal due to nonpayment of costs (Attachments); Notice of motion (eav) [Entry date 04/15/98]

4/14/98 97 AMENDED by defendant

memorandum in support of motion for involuntary dismissal due to plaintiff's nonpayment of costs [91-1] (Attachments); Notice of filing (eav) [Entry date 04/15/98]

4/14/98 98 MINUTE ORDER of 4/14/98 by Hon. George M. Marovich : Defendant's motion for involuntary dismissal is denied. [95-1] Plaintiff is given to 6/15/98 to pay appellate costs of $1,569.00. Defendant's motion for leave to file an amended brief is granted. [96-1] No notice (eav) [Entry date 04/15/98]

4/16/98 99 TRANSCRIPT of proceedings for the following date(s): 3/13/98 Before Honorable Arlander Keys (eav) [Entry date 04/17/98]

4/27/98 100 REPORT AND RECOMMENDATION concerning motion for second preliminary injunction [69-1] (eav) [Entry date 04/28/98]

4/27/98 101 MINUTE ORDER of 4/27/98 by Hon. Arlander Keys : Report and Recommendation regarding plaintiff's motion for second preliminary injunction [69-1], Defendant's motion for summary judgment on plaintiff's facial challenge [79-1], Plaintiff's motion for summary judgment [82-1] and

granted in part. [82-1] This court also recommends that defendant's motion for summary judgment be denied. [79-1], [88-1] All matters relating to the referral of this action having been resolved, the case is returned to the assigned judge. (Terminating the case referral to Hon. Arlander Keys). motion to strike defendant's references to materials outside of the summary judgment record [109-1] Distributed notices by judge's staff/picked up. (eav) Entry date 03/09/99]

3/22/99 132 OBJECTIONS by defendant to Report and Recommendation granting partial summary judgment (Attachments) (eav) [Entry date 03/23/99]

3/25/99 133 RESPONSE by plaintiff to defendant's objections to Magistrate's Report and Recommendation; Notice of filing (eav) [Entry date 03/26/99]

3/29/99 134 MEMORANDUM, OPINION, AND ORDER (eav) [Entry date 03/30/99]

3/29/99 135 MINUTE ORDER of 3/29/99 by Hon. George M. Marovich : Pursuant to memorandum opinion and order entered this day, defendant park District's motion for summary judgment is granted and

Defendant's motion for summary judgment on plaintiff's as applied challenge [88-1] is hereby submitted to Judge Marovich. All matters relating to the referral of this action having been resolved, the case is returned to the assigned judge. terminating case referral to Hon. Arlander Keys. Mailed notice (eav) [Entry date 04/28/98]

4/28/98 103 MOTION by plaintiff to shorten time within which defendant may respond to plaintiff's objections to the Magistrate Judge's Report and Recommendation that plaintiff's motion for second injunction be denied; Notice of motion (eav) [Entry date 05/01/98]

4/29/98 102 RESPONSE by defendant to plaintiff's motion to shorten time to respond to objections; Notice of filing (eav) [Entry date 04/30/98]

4/30/98 104 MINUTE ORDER of 4/30/98 by Hon. George M. Marovich : Plaintiff's motion to shorten time to file objections is denied. [103-1] Objections to the magistrate-judge's report and recommendation are to be filed by 5/14/98. Response is to be filed by 5/21/98. Court will rule by mail. No notice (eav) [Entry date 05/01/98]

5/11/98 105 OBJECTIONS by defendant to Portion of 4/27/98 Report and Recommendation [100-1] (Exhibit); Notice of filing (eav) [Entry date 05/12/98]

5/14/98 106 OBJECTIONS by plaintiff to the Magistrate Judge's 4/27/98 Report and Recommendation [100-1] (Exhibit); Notice of filing (eav) [Entry date 05/15/98]

5/21/98 107 REPLY by plaintiff to the Chicago Park District's objections to portion of 4/27/98 Report & Recommendation [105-1]; Notice of filing (eav) [Entry date 05/22/98]

5/21/98 108 RESPONSE by defendant to plaintiff's objections to Magistrate Judge's 4/27/98 Report & Recommendation; Notice of filing (eav) [Entry date 05/22/98]

5/26/98 109 MOTION by plaintiff to strike defendant's references to materials outside of the summary judgment record (Attachments); Notice of motion (eav) [Entry date 05/29/98]

5/28/98 110 RESPONSE by defendant to plaintiff's motion to strike defendant's references outside the summary judgment record [109-1] (Exhibit); Notice of filing (eav) [Entry date 05/29/98]

5/28/98	111	MINUTE ORDER of 5/28/98 by Hon. George M. Marovich : Plaintiff's motion to strike [109-1] is taken under advisement. Telephoned notice (eav) [Entry date 05/29/98]
6/1/98	112	REPLY by plaintiff to defendant's response to plaintiff's motion to strike [110-1]; Notice of filing (eav) [Entry date 06/02/98]
6/19/98	113	TRANSCRIPT of proceedings for the following date(s): 4/30/98 Before Honorable George M. Marovich (eav) [Entry date 06/22/98]
6/25/98	114	TRANSCRIPT of proceedings for the following date(s): 2/6/98 Before Honorable Arlander Keys (eav) [Entry date 06/25/98]
7/1/98	115	MINUTE ORDER of 7/1/98 by Hon. George M. Marovich : The court adopts the Magistrate-Judge's report and recommendation in its entirety concerning the second preliminary injunction and the partial motion for summary judgment on the "as applied" challenge to the ordinance. The issue of the "facial" challenge to the constitutionality of the ordinance is remanded to the magistrate-judge for further

development and an amended report and recommendation. [69-1], [69-2] (See reverse of minute order.) Mailed notice (eav) [Entry date 07/02/98]

8/5/98	--	SCHEDULE set on 8/5/98 by Hon. Arlander Keys : Status hearing set for 8/17/98 at 9:00 a.m. Mailed notice (vkd)
8/11/98	116	REFERRAL ORDER of 8/7/98: The case is referred to the Magistrate Judge Arlander Keys pursuant to Local General Rule 2.41(b) to conduct hearings and enter appropriate orders on the following pretrial motion/matter: Perform such additional duties as are not inconsistent with the Constitution and laws of the United States, as specifically prepare an amended report and recommendation on the facial challenge issue as outlined in this court's order dated 7/1/98. (For further detail see order.) Mailed notice (eav) [Entry date 08/11/98]
8/17/98		SCHEDULE set on 8/17/98 by Hon. Arlander Keys : Status hearing held and continued to 9/18/98 at 9:00 a.m. No notice (vkd) [Entry date 08/18/98]
9/15/98	--	SCHEDULE set on 9/15/98 by Hon.

Arlander Keys : Pursuant to a request by Plaintiff's counsel, status hearing reset to 9/30/98 at 9:00 a.m. Mailed notice (vkd) [Entry date 09/15/98]

9/22/98 117 — MOTION by plaintiff to extend time to pay interlocutory costs ; Notice of motion (eav) [Entry date 09/25/98]

9/23/98 119 — MEMORANDUM by defendant in opposition to plaintiff's motion to extend time to pay interlocutory costs; Notice of filing (eav) [Entry date 09/25/98]

9/24/98 118 — MINUTE ORDER of 9/24/98 by Hon. George M. Marovich: Plaintiff's motion to extend time to pay the costs of appeal is granted in part. [117-1] Plaintiff is given to 10/2/98 to pay the appeal costs. Final extension. Plaintiff is advised that failure to comply with this order will result in sanctions not excluding dismissal of this action. Mailed notice (eav) [Entry date 09/25/98]

9/30/98 -- — SCHEDULE set on 9/30/98 by Hon. Arlander Keys : Status hearing held. Parties will file Rule 12(m) statements and briefs by 10/21/98. Cross Rule 12(n) statements to be filed by 11/12/98. Mailed notice (vkd) [Entry date 09/30/98]

10/21/98 120 — SUPPLEMENT by plaintiff to motion for summary judgment [82-1] (rm) [Entry date 10/22/98]

10/21/98 121 — MEMORANDUM by plaintiff in support of supplement to motion for summary judgment [120-1] (rm) [Entry date 10/22/98]

10/21/98 122 — SUPPLEMENTAL statement of uncontested facts by plaintiff [84-1] (Attachments); Notice of filing (rm) [Entry date 10/22/98]

10/21/98 123 — SUPPLEMENTAL RULE 12(M) statement in support of motion for summary judgment by Chgo Pk Dist regarding statement [90-1] (Attachment); Notice of filing (rm) [Entry date 10/22/98]

10/21/98 124 — SUPPLEMENTAL MEMORANDUM on cross motion for summary judgment by Chgo Pk Dist (Attachments); Notice of filing (rm) [Entry date 10/22/98]

11/12/98 125 — LOCAL RULE 12(N) RESPONSE by plaintiff to defendant's supplemental Rule 12(M) statement; Notice of filing (eav) [Entry date 11/12/98]

11/12/98 126 — REPLY by plaintiff memorandum in support of supplement to motion for summary judgment [121-1] (eav)

[Entry date 11/12/98]

11/12/98 127 SUPPLEMENTAL REPLY MEMORANDUM by defendant on cross motions for summary judgment; Notice of filing (eav) [Entry date 11/13/98]

11/12/98 128 SUPPLEMENTAL RULE 12(N) Statement on MacDonald's motion for partial summary judgment by defendant (Attachments) (eav) Entry date 11/13/98]

3/8/99 129 MINUTE ORDER of 3/8/99 by Hon. George M. Marovich : Any objections to the Magistrate's Report and Recommendation are to be filed by 3/22/99. Responses are to be filed by 3/25/99. Court will rule by mail. Mailed notice (eav) [Entry date 03/09/99]

3/8/99 130 REPORT AND RECOMMENDATION concerning motion for summary judgment [88-1], [82-1], [79-1] (eav) [Entry date 03/09/99]

3/8/99 131 MINUTE ORDER of 3/8/99 by Hon. Arlander Keys : Report and Recommendation regarding the parties' cross-motions for summary judgment is hereby submitted to Judge Marovich. This Court recommends that plaintiff's motion for summary judgment be

plaintiff's motion for summary judgment is denied, terminating case Mailed notice (eav) [Entry date 03/30/99]

3/29/99 136 ENTERED JUDGMENT (eav) [Entry date 03/30/99]

4/1/99 137 NOTICE OF APPEAL by plaintiff from judgment entered [136-1], from motion minute order [135-2], from order [134-1] ($105.00 Paid) (da) [Entry date 04/06/99]

4/1/99 138 DOCKETING STATEMENT by plaintiff regarding appeal [137-1] . (da) [Entry date 04/06/99]

4/6/99 -- TRANSMITTED to the 7th Circuit the short record on appeal . Mailed notice to all counsel. (da) [Entry date 04/06/99]

4/8/99 140 SEVENTH CIRCUIT transcript information sheet by Robert MacDonald (jmp) [Entry date 04/13/99]

4/9/99 139 ACKNOWLEDGMENT of receipt of short record on appeal USCA 99-1811 (eav) [Entry date 04/12/99]

4/14/99 141 TRANSCRIPT of proceedings for the following date(s): 9/30/98 Before Honorable Arlander

Keys (eav)
[Entry date 04/14/99]

4/21/99 -- TRANSMITTED to the 7th Circuit the long record on appeal no. 99-1811 consisting of five volumes of pleadings with thirteen volumes of transcripts of proceeding and one volume of exhibits transmitted under separate certificate. Mailed notice to all counsel. (pp) [Entry date 04/21/99]

7/1/99 142 NOTICE by defendant Chgo Pk Dist of attorneys Steven A. Weiss and Kevin T. Kerns of change of address (eav) [Entry date 07/02/99]

11/8/00 143 CERTIFIED copy of Order dated 11/07/00 from the 7th Circuit. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc. The petition is therefore denied. (99-1811) (For further detail see order.). (hp) [Entry date 11/09/00]

11/17/00 144 LETTER from the 7th Circuit returning the record on appeal no. 99-1811 consisting of five volumes of pleadings, thirteen volumes of transcript of proceedings and one volume of exhibits. (hp) [Entry date 11/20/00]

11/17/00 145 CERTIFIED COPY of order dated 09/14/00 from the 7th Circuit: The judgment of the District Court is affirmed, with costs, in accordance with the decision of this court entered on this date. [137-1] (99-1811) (hp) [Entry date 11/20/00]

11/17/00 146 OPINION from the 7th Circuit: Argued 04/19/00; Decided 09/14/00. (99-1811) (hp) [Entry date 11/20/00]

GENERAL DOCKET FOR
Seventh Circuit Court of Appeals

Court of Appeals Docket #: 99-1811
Filed: 4/7/99
Nsuit: 3440 Oth Civil Rights-Fed. Question
Thomas, Caren Cronk, et al v. Chicago Park Dist
Appeal from: United States District Court

- -
Lower court information:

District: 0752-1 : 97 C 2963
Ordering Judge: George M. Marovich, Judge
Court Reporter: Geraldine Monahan, Court Reporter
Date Filed: 4/25/97
Date order/judgment: 3/29/99
Date NOA filed: 4/1/99

- -
Fee status: paid
- -
Prior cases:
97-3106 wjc msk idr
Date filed: 8/20/97 Date disposed: 12/12/97
Disposition: VACATED

Current cases: None

Proceedings include all events.
99-1811 Thomas, Caren Cronk, et al v. Chicago Park Dist

ROBERT MACDONALD
Plaintiff - Appellant
[term 08/02/99]
v.

CHICAGO PARK DISTRICT, a body

political and corporate 312/701-9311
Defendant - Appellee

Steven A. Weiss
SCHOPF & WEISS
312 W. Randolph Street
Chicago, IL 60606

CAREN CRONK THOMAS and
WINDY CITY HEMP DEVELOPMENT BOARD,
Plaintiffs - Appellants

Wayne B. Giampietro
WITWER, POLTROCK & GIAMPIETRO
125 S. Wacker Drive
Suite 2700
Chicago, IL 60606
312/332-6000
FAX 312/332-6008

Richard L. Wilson
3610 Dubsdread Circle
Orlando, FL 32804
407/649-9225
Plaintiff - Appellant (See above)

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,
Plaintiffs - Appellants
v.

CHICAGO PARK DISTRICT,
Defendant - Appellee

Proceedings include all events.
99-1811 Thomas, Caren Cronk, et al v. Chicago Park Dist

4/7/99	Private civil case docketed. [99-1811] [1165297-1] Transcript information sheet due 4/19/99. Appellant's brief due 5/17/99 for Robert MacDonald. (squi)
4/7/99	[99-1811] ROA from No. Dist. of Il., E. Div. due 4/15/99. (squi)
4/7/99	Filed Appellant Robert MacDonald docketing statement. [99-1811] [1165319-1] (squi)
4/16/99	Certificate of interest filed by Appellee Chicago Park Dist. [99-1811] [1165297-1] (squi)
4/16/99	Appearance form filed by attorneys Steven A. Weiss and Kevin T. Kerns for Appellee Chicago Park Dist. [99-1811] [1165297-1] (squi)
4/21/99	Original record on appeal filed. Contents of record: 5 vol. pleadings; 13 vol. transcripts; 1 vol. exhibits; [99-1811] [1171545-1] (eric)
5/7/99	ORDER: Pursuant to Federal Rule of Appellate Procedure 33, briefing will proceed as follows: [1165297-1]

SCO [99-1811]
Appellant's brief due 6/8/99 for Robert MacDonald. Appellee's brief due 7/8/99 for Chicago Park Dist. Appellant's reply brief due 7/22/99 for Robert MacDonald.
(patb)

5/12/99	Filed Seventh Circuit Transcript Information Sheet by Wayne B. Giampietro for Appellant Robert MacDonald. [99-1811] [1165297-1] (patb)
5/13/99	Disclosure Statement filed by Attorney Wayne B. Giampietro For Appellant Robert MacDonald. [99-1811] [1165297-1] (patb)
6/8/99	Filed 15c appellant's brief by Robert MacDonald. Certification filed. [99-1811] [1186752-1] (patb)
6/8/99	Filed 10c appendix by Appellant Robert MacDonald. [99-1811] [1186753-1] (patb)
6/14/99	Filed oversized record in Section # 18 of exhibit room: 1 box containing 5 vol. pleadings; 13 vol. transcripts;[1165297-1] [99-1811] (nick)
7/2/99	Filed suggestion of death of plaintiff-appellant and motion to substitute parties by attorney Wayne

B. Giampietro.
[1194318-1] [1194318-1] [99-1811] (patb)

7/8/99 Filed 15c appellee's brief by Chicago Park Dist. Disk filed. [99-1811] [1195617-1] (patb)

7/9/99 Filed Appellee Chicago Park Dist Memorandum In Opposition to motion to substitute parties. [1196141-1] [99-1811] [196141-1] (patb)

7/9/99 ORDER: Filed clerk's notice to Appellee Chicago Park Dist to file a response to Attorney Giampietro's 7/2/99 Suggestion of Death of Plaintiff-Appellant and Motion to Substitute Parties.

Briefing in this appeal is DEFERRED pending resolution of the motion. [1194318-1] JKL [99-1811] [1198276-1] Response due 7/22/99 for Chicago Park Dist. (patb)

7/12/99 Reply in support of motion to substitute parties filed by counsel for Appellant Robert MacDonald. [99-1811] [1196747-1] (patb)

8/2/99 ORDER issued GRANTING Attorney Giampietro's 7/2/99 motion. Pursuant to Fed.R.App.P. 43(a)(1), [1194318-1] Caren Cronk Thomas and Windy City Hemp are GRANTED leave to substitute as appellants in place of Robert MacDonald,

deceased. The clerk of this court is directed to modify the docket to reflect this change. Furthermore, counsel for appellants shall file a corporate disclosure statement, pursuant to Fed.R.App.P. 26.1, by 8/9/99. The clerk is directed to distribute a copy of this order to the assigned merits panel. JKL [99-1811] (patb)

8/3/99 Filed Appellant Windy City Hemp, Appellant Karen Cronk Thomas Citation of Additional Authority, per CR 28(e). [99-1811] [1203118-1] (kell)

8/10/99 Amended certificate of interest after substitution of parties filed by Attorney Wayne B. Giampietro for Appellant Windy City Hemp, Appellant Karen Cronk Thomas. [99-1811] [1165297-1] (patb)

12/22/99 ORDER: Briefing will proceed as follows: [1165297-1] JKL [99-1811] Appellant's reply brief due 1/7/00 for Karen Cronk Thomas, for Windy City Hemp. (jenp)

1/6/00 Filed Appellee Chicago Park Dist Citation of Additional Authority, per CR 28(e). Dist. [99-1811] [1249013-1] (land)

1/7/00 Filed 15c appellant's reply brief by

Windy City Hemp, Karen Cronk Thomas. Disk filed. [99-1811] [1249855-1] (land)

2/4/00 Filed oversized record in Section # 18 of exhibit room: 2 boxes containing assorted briefs/appendix. [1165297-1] [99-1811] (cove)

2/4/00 Filed Appellant Windy City Hemp, Appellant Karen Cronk Thomas Citation of Additional Authority, per CR 28(e). Dist. [99-1811] [1259047-1] (land)

3/1/00 Filed Appellant Windy City Hemp, Appellant Karen Cronk Thomas Citation of Additional Authority, per CR 28(e). Dist. [99-1811] [1266412-1] (land)

3/22/00 ORDER: Argument set for Wednesday, April 19, 2000 at 9:30 a.m. Each side limited to 20 minutes. [99-1811] [1272457-1] (broo)

4/18/00 ORDER: Argument reset for Wednesday, April 19, 2000 at 9:30 a.m. Each side limited to 15 minutes. [99-1811] [1281894-1] (broo)

4/19/00 Case heard and taken under advisement by panel: Chief Judge Richard A. Posner, Circuit Judge

John L. Coffey, Circuit Judge Frank H. Easterbrook. [99-1811] [1282960-1] (broo)

4/19/00 Case argued by Richard L. Wilson for Appellant Karen Cronk Thomas, Appellant Windy City Hemp, Steven A. Weiss for Appellee Chicago Park Dist. [99-1811] [1165297-1] (broo)

9/14/00 Filed opinion of the court by Judge Posner. AFFIRMED. Circuit Judge Richard A. Posner, Circuit Judge John L. Coffey, Circuit Judge Frank H. Easterbrook. [99-1811] [1165297-1] (hard)

9/14/00 ORDER: Final judgment filed per opinion. With costs: y. [99-1811] [1325355-1] (hard)

9/28/00 Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellant Windy City Hemp, Appellant Caren Cronk Thomas. Dist. [99-1811] [1330015-1] (hard)

10/10/00 Sent clerk's copy of request to Appellee Chicago Park Dist requesting 30c of their Answer to the Petition for Rehearing and Petition for Rehearing Enbanc filed by the appellants' on 9/28/00. [99-1811] [1332947-1] Answer to Petition for

	Enbanc Rehearing due 10/24/00 for Chicago Park Dist. (hard)
10/24/00	Filed 30c Answer of Appellee Chicago Park Dist to Petition for Rehearing and Petition for Rehearing Enbanc. Dist. [99-1811] [1337688-1] (hard)
11/7/00	ORDER: Appellant Windy City Hemp, Appellant Caren Cronk Thomas Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [99-1811] [1330015-1] (hard)
11/15/00	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 5 vol. pleadings; 13 vol. transcripts; 1 vol. exhibits;) [99-1811] [1165297-1] (cove)
11/21/00	Filed record receipt. [1346686-1] [99-1811] (cove)
2/5/01	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 00-1249. [99-1811] [1369269-1] (hard)
5/31/01	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 00-1249. [99-1811] [1403889-1] (hard)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

ROBERT MACDONALD	)
	)
	) No. 97 C 2963
Plaintiff,	)
vs.	)Judge George
	)Maravich
CHICAGO PARK DISTRICT,	)
a body political and corporate,	)VERIFIED
	) COMPLAINT FOR
	)DECLARATORY
Defendant.	)JUDGMENT AND
	) PERMANENT
	) INJUNCTION

Plaintiff Robert MacDonald brings this lawsuit to challenge a certain provision in the Code of Ordinances of the Chicago Park District. The ordinance in question governs the issuance of permits for rallies in public parks. MacDonald seeks a judgment declaring that the challenged ordinance violates the First Amendment to the United States Constitution, and an injunction permanently prohibiting its enforcement.

JURISDICTION

1. This suit is brought pursuant to 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

This case arises under the Constitution of the United States, and this Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202.

PARTIES

2. Plaintiff Robert MacDonald is a natural person and a citizen of Illinois. MacDonald maintains an office at 2558 W. Armitage, Chicago, Illinois 60647.

3. Defendant Chicago Park District is a body politic, organized and operating under the laws of the State of Illinois, and empowered to sue and be sued in its own name.

VENUE

4. The Park District is located in Cook County, within the Northern District of Illinois, Eastern Division. All of the acts complained of herein have occurred, and will occur, within the Northern District of Illinois, Eastern Division.

FACTS

6. MacDonald is an activist in a political movement to change the laws of the United States and the several states prohibiting the sale and possession of cannabis, to educate the public as to the need for a change, and to raise public support for his political cause.

7. MacDonald is actively involved in organizing public rallies, at which he and others encourage public support for their political movement, present speakers, and raise funds to support their political efforts.

8. MacDonald wants to sponsor and conduct a political rally at Butler Field on May 10 and 11, 1997.

9. The political rally will have three principal

purposes: (a) to provide a forum for all interested persons to speak out on an issue of great public concern, the laws prohibiting the possession, sale and distribution of cannabis; (b) to raise public support for the efforts of MacDonald and others to effect a change in those laws; and (c) to raise money to defray costs of the rally and for future political activities.

10. The proposed activities are all protected under the First Amendment.

11. Butler Field at Grant Park's Petrillo Bandshell is a public park in the City of Chicago, and activities at Butler Field are regulated under Chapter VII.

12. Butler Field is a public forum, both by designation of the City of Chicago and by tradition.

13. Pursuant to 70 ILCS 1205/8-1, the Park District is empowered to enact ordinances in furtherance of its responsibility to administer the public parks of the City.

14. The Park District has enacted Chapter VII

of the District Code.[1] Chapter VII, titled *Use of Parks*, regulates activities in all public parks in the City.

15. Section C of Chapter VII establishes a permitting scheme for those persons who wish to use any City parks.

16. Under § C(3)(a), MacDonald is required to obtain a permit in order to hold his rally.

17. As required by the ordinance, MacDonald submitted an application for a permit for the rally to the Park District on March 4, 1997.[2]

18. On March 12th, Park District Deputy General Counsel Joan Fencik sent a letter to MacDonald notifying him that the application had been denied.[3]

19. § 5(e) sets forth the reasons for which a permit can be denied. Included in that list are the following three items:

---

1. A true copy of Chapter VII, Section C is attached to this Complaint as Exhibit A.

2. Exhibit B.

3. Exhibit C. The letter did not indicate who had made the decision to deny the application.

(1) the application for permit is not fully completed and executed;

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(13) the applicant or the person on whose behalf the application was made has on prior occasions made material representations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to the applicant.

20. Fencik's letter indicates that the bases for denial of the permit application was for alleged violations of each of the three listed conditions.

21. The letter informed MacDonald that he had seven days to appeal from the denial to the General Superintendent of the Park District.

22. On March 18th MacDonald filed his appeal.[4] That appeal refuted each of the grounds used to deny the permit.

23. On March 24th Forest Claypool, General Superintendent of the Chicago Park District, sent a letter

4. Exhibit D.

notifying MacDonald that his appeal had been denied.[5]

24. General Superintendent Claypool and whoever originally denied the permit application are employees of the Park District, and their actions were taken within the scope of their authority.

25. Chapter VII, § C(5)(e) is facially unconstitutional as an unlawful prior restraint of free expression for the following reasons:

A. it is an unlawful delegation of authority to deny a permit without providing sufficient standards limiting the discretion of the city officials charged with granting or denying the permit;

B. it does not provide for prompt judicial review in the event a permit application is denied;

C. it does not place the burden on seeking prompt judicial review to justify the denial of the permit on the Park District; and

D. it allows a permit to be denied for future speech based on allegations of improper, illegal or unauthorized conduct by the applicant or virtually any

5. Exhibit E. MacDonald filed an amended appeal on March 25th (Exhibit F), which was summarily denied on March 26th (Exhibit G).

other persons at a past event for which a permit has been issued.

26. Chapter VII, § C(5)(e) has been unconstitutionally applied to MacDonald to deny him due process of law guaranteed by the Fourteenth Amendment.

27. The actions of the Park District (through its employees) threaten to deprive MacDonald, his colleagues and associates and the public at large of rights guaranteed to them under the First Amendment: the right to freedom of expression, freedom of assembly and freedom of association.

28. All acts of the Park District (through its employees) which are alleged in this Complaint were done under color of state law or authority.

COUNT ONE - DECLARATORY JUDGMENT

29. MacDonald realleges those facts set forth in Paragraphs 6 - 28, and incorporates those facts in this Count by reference.

30. There is a dispute between the parties as to MacDonald's rights under the First Amendment, as those rights have been abridged by the actions of the Park

District under Chapter VII of the Park District Code.

31. MacDonald is entitled to a judgment declaring his right to conduct his political rally in a public forum without having to be subjected to an unconstitutional permitting ordinance.

COUNT TWO - PERMANENT INJUNCTION

32 MacDonald realleges those facts set forth in Paragraphs 6 - 28, and incorporates those facts in this Count by reference.

33. Chapter VII, § C(5)(e) of the Park District Code is unconstitutional on its face under the First Amendment, and as it has been applied against MacDonald.

34. MacDonald has no adequate remedy at law.

35. Unless this Court issues a permanent injunction against all future enforcement of § C(5)(e), MacDonald will suffer an irreparable injury by the loss of his rights under the First Amendment.

36. The injury to MacDonald, should this Court deny a permanent injunction, exceeds any possible harm to the Park District if a permanent injunction is entered.

MacDonald will suffer the loss of constitutional rights found by the United States Supreme Court to be at the very core of those protected by the First Amendment. The only "loss" to the Park District is the ability to unconstitutionally deny those rights to persons wishing to engage in free speech on matters of public concern in a traditional public forum.

37. A permanent injunction will not be contrary to the public interest.

WHEREFORE, Robert MacDonald asks this Court to do the following:

A. take jurisdiction over this cause and the parties;

B. enter judgment for MacDonald and against the Chicago Park District declaring that § C(5)(e) of the Park District Code is facially unconstitutional;

C. enter judgment for MacDonald and against the Park District declaring that § C(5)(e) has been unconstitutionally applied against MacDonald;

D. enter an injunction permanently prohibiting the Park District, its agents and employees from enforcing

§ C(5)(e);

E. award MacDonald all reasonable costs of this action, including an attorney's fee pursuant to 42 U.S.C. § 1988; and

F. grant MacDonald all other relief in law and in equity to which he is entitled.

Wayne B. Giampietro
Witwer, Poltrock &Giampietro
Illinois Bar No.00947776
125 S. Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 332 6000 (Fax) 332-6008

and

Richard L. Wilson
3610 Dubsdread Circle
Orlando, Florida 32804
(407) 649-9225 (Fax) 423-8727

Attorneys for Plaintiff

AFFIDAVIT

STATE OF: Illinois)
)
COUNTY OF: Cook)

I, ROBERT MACDONALD, after being placed under oath do state:

1. I have read the foregoing Verified Complaint for Declaratory Judgment and Permanent Injunction.

2. The facts alleged in the Verified Complaint are true and correct.

ROBERT MACDONALD

(SIGNATURE)

Robert MacDonald

Sworn to and subscribed before me on this 25th day of April, 1997.

ANTOINETTE F. DELLACROCE

Notary Public - State of Illinois

EXHIBIT A TO COMPLAINT

CHAPTER VII.
USE OF PARKS.

SECTION A.

DEFINITIONS.

For purposes of this chapter, the following words, terms, phrases and their derivatives shall have the meanings set forth in this section. When not inconsistent with the context, the present tense shall include the future tense; the plural shall include the singular number and the singular number shall include the plural number.

"Amplified Sound" means any sound projected or transmitted by artificial means, including, but not limited to, loudspeakers, amplifiers, powered megaphones or any similar devices.

"Horse" means any member of the equine family.

"Parade" means any march or other organized movement of persons from place to place, or about a place.

"Pollute" means to perform any act or acts destroying, contaminating, fouling or otherwise altering the physical, topographic, chemical or biological properties of a park, including land, waters, buildings, furnishings, equipment, vegetation and animals, including, but not limited to, the deposit of garbage, litter or water matter; changes in the

temperature, taste, color, turgidity or odor of water; the discharge of any liquid, gas, solid, radioactive or other substance in any park which causes, or is likely to cause, a public nuisance or an injury to the public health, safety or welfare, or injury to vegetation or animals, or otherwise impair the safe, healthful and beneficial use of a park.

"Stallion" means a male horse, not castrated.

* * * * *

SECTION C. PERMITS.

1. Designation of Park Facilities.

a. Proposed Designation.

The General Superintendent shall classify all park property under a uniform system of classification and designate for each such classification the use or uses which, in his/her judgment, should be permitted therein. Categories of classifications which the General Superintendent shall designate may include, but are not limited to, parks, playgrounds, playlots, fieldhouses, boat harbors, and leased facilities. The General Superintendent shall classify all park property under the following classification system:

(1) public forums;
(2) limited use areas;
(3) areas or facilities not designated for public assembly; or
(4) special facilities.

The General Superintendent shall then record the designations for each park and shall transmit the same promptly to the Board, which shall then approve, amend or reject the designations. Thereafter, the General Superintendent may, from time to time, as he/she shall deem necessary and proper, amend or revise his/her designations and shall promptly transmit in writing the amendments or revisions to the Board, which shall approve, amend or reject the same. All such designations, and the General Superintendent's amendments and revisions thereof, shall be in full force and effect from the

time that the same are expressly approved as such or as amended by the Board.

b. Public Review of Proposed Designation.

Simultaneous with the transmission to the Board of the plats or maps required by this ordinance, or of any written amendments or revisions thereof, the General Superintendent shall file a duplicate copy of the same with the Secretary, which duplicate copy shall be available for public inspection and copying in the Office of the Secretary during normal business hours.

2. Rules and Regulations.

The General Superintendent may, from time to time, establish reasonable rules and regulations, for the use of each facility in the Park System. Such rules and regulations shall be based on a due regard for the purpose for which the facility is established, the safety of those using the facility, of park Employees and of the public, the safety and maintenance of Park District property, the need for and the availability of supervisory personnel, and the maximum number of people who can safely use the facility at one time. Subject to the foregoing, and except as hereinafter provided, all Park District facilities may be used by members of the general public, without permit, for recreational and athletic purposes not inconsistent with the nature of the facility and the safety of the public and of Park District property.

3. Permit Requirement

a. General.

No person shall, without a permit:

1. conduct a public assembly, parade, picnic, or other event involving more than fifty individuals;
2. circulate or distribute any leaflets, handbills, notices, pamphlets, books, documents or papers of any kind in any indoor facility , fieldhouse, garden, zoological garden or other special facility;
3. conduct and exhibit, music or dramatic performance, fair, circus, concert, play, radio or television broadcast, other than a news transmission;
4. exhibit or display any motion picture, television program, light or laser light display, or similar event;
5. operate a vehicle, except upon a publicly dedicated street, alley, watercourse or other thoroughfare which may abut or traverse a park;
6. create or emit any Amplified Sound, except from a radio, recorder or other device possessed and used by an individual for his/her own enjoyment and operated in such a manner so as not to interfere with the use and enjoyment by an other person;
7. station or erect any building, tent, canopy, stand, bandstand, stage, tower, scaffold, sound stage, platform, rostrum or other structure;
8 station or use any electrical or electronic device or equipment that would require

outdoor auxiliary power;

9. or sell or offer for sale any goods or services;

10. display, post or distribute any placard, handbill, pamphlet, circular, book or other writing containing commercial advertising matter within the Park System;

11. bring, land or cause to ascend or descend or alight within the Park District, any airplane, helicopter, flying machine, balloon, parachute or other apparatus for aviation;

12. conduct any sporting event;

13. ride any Horse on any driveway, roadway, path or trail; or

14. bring onto property a tame, non-domestic supervised and controlled or restrained animal for limited non-commercial or promotional purposes.

b. Permits for Activities Involving More than 500 Individuals.

No activity involving more than five hundred individuals shall be held within two thousand five hundred feet nor within two hours of any other activity involving more than five hundred individuals.

4. <u>Application for Permits</u>

a. Filing Written Application.

1. Special Event Permit

Any person seeking the issuance of a permit shall apply for a permit by filing a written application

for permit on a form and within such time as shall be prescribed by the General Superintendent. Applications involving any of the following activities shall be filed with the Region Manager for the region in which the special event is to take place, or his/her designee:

(a) an event involving more than fifty individuals;

(b) the sale or offering for sale of any good or service;

(c) the sale or service of alcohol on Park District property;

(d) advertising or commercial activities;

(e) activities involving more than one park;

(f) a religious or partisan political event;

(g) create or emit any Amplified Sound, except from a radio, recorder or other device possessed and used by an individual for his/her own enjoyment and operated in such a manner so as not to interfere with the use and enjoyment by another person;

(h) station or erect any building, stand bandstand, stage, tower, tent, canopy, scaffold, sound stage, platform, rostrum or other structure;

i. use of any electrical or electronic device or equipment requiring outdoor auxiliary power;

j. brief land or cause to ascend or descend or alight within the Park District, any airplane, helicopter, flying machine, balloon, parachute or other apparatus for aviation;

k. riding of a Horse or Horses; or

l. use of mechanical rides (which may be permitted only on hard surfaces).

(2) Media/Motion Picture/Commercial Photography

Any person seeking the issuance of a permit for filming of a media broadcast (other than a news transmission), motion picture, or still commercial photography shall file a written application for permit with the General Superintendent or his/her designee on a form and within such time as shall be prescribed by the General Superintendent.

(3) Recreational Permits

Any person seeking to reserve Park District facilities for any event involving less than fifty people and not including the items covered in paragraph 4(a)(1), above, shall file a written application with the park/playground supervisor where the event is proposed to take place on a form and within such time as shall be prescribed by the General Superintendent.

(4) Special Facilities

Any person seeking the issuance of a permit for

d. Security Deposit.

For any activity described in this chapter, Section C.4. a(1)(a) through a(1) (j), no application for permit shall be granted unless the same shall be accompanied by the deposit of a sum of money equal to the estimated cost of policing, cleaning up and restoring the park upon conclusion of the use or activity , as set by the schedule of fees set by the General Superintendent and approved by the Board. The security deposit shall be deposited by the Park District into an escrow account. Promptly after the conclusion of a use or activity, permit activity, the Park District shall inspect the premises and equipment used by the permittee.

(1) If it is determined that there has been no damage to Park District Property or equipment beyond reasonable wear and tear, the security deposit shall be refunded in full within thirty (30) days of the conclusion of the permitted event.

(2) If it is determined by such inspection, that the permitted event proximately caused damage to Park District property in excess of normal wear and tear and which requires repairs in excess of routine maintenance or determined that fines should be assessed against the permittee pursuant to this chapter , Section C.7., below, the Park District shall retain the security deposit or any portion, thereof, necessary to pay for the cost repair or any fines assessed against the permittee. The General Superintendent or his/her designee shall given written notice of the assessment of damages or fine

and retention of the security deposit to the permittee by personal delivery or by deposit in the United States mail, with proper postage prepaid to the name and address set forth in the application for permit. An assessment of damages or fine may be appealed as provided in this chapter, Section C.6., below.

e. Fees for Use of Park Facilities.

No application for permit shall be granted unless the same shall be accompanied by a user fee as provided in the uniform schedule of fees set by the General Superintendent and approved by the Board. No application for permit shall be granted unless all required fees are paid as specified in paragraph 5(b), below.

f. Insurance.

Applicant shall procure and maintain at all times during its use of Park District property, insurance in such amounts and with such coverages as shall reasonably be required by the Park District and shall name Park District as an additional insured thereunder. The amounts and type of insurance required shall be determined by the Division of Risk Management, based upon the nature of the activity and the risk involved. The Division of Risk Management shall prepare a uniform schedule of insurance guidelines for particular types of activities. Applicant shall provide Park District with a certificate from an insurer evidencing such coverage prior to applicant's use of Park District

property, and within the time Prescribed by the General Superintendent. The certificate shall also provide that the insurer shall give the Park District reasonable advance notice of insurer's intent to cancel the insurance coverage provided.

g. Permits Not Transferable

No permit or preliminarily approved permit application may be transferred.

5. Processing of Application for Permits.

a. Order.

Applications for permits shall be processed in order of receipt; and the use of a particular park or part thereof shall be allocated in order of receipt of fully executed applications accomplished by the application fee.

b. Preliminary Approval

Applications for permits for activities or events which require insurance, approval or permits from other governmental entities, or compliance with other terms or conditions, will be reviewed and, if the application otherwise conforms to all other requirements, a preliminary approval will be issued. If, within fourteen days of the issuance of the preliminary approval, an insurance certificate evidencing the requisite insurance is not filed by the Division of Risk Management, or the approval or permit of other governmental entities has not been received, or the other terms and conditions have not been met, the preliminary approval will expire, the application for permit will be deemed denied and no

written notice of denial will be required. For events or activities which involve the use of special facilities, or activities described in this chapter, Section C.4.a. (1) (c}, (d), (g), (h}, (i) or (j), above, all terms and conditions for issuance of the permit, including securing insurance and payment of all fees and security deposit, must be completed at least thirty days prior to the event.

No permit shall be issued unless all applicable fees and security deposit are paid within the times prescribed by the General Superintendent. Failure to pay fees or security deposit within that time shall cause the application to be deemed denied, without further notice to the applicant.

c. Written Denials.

Except for applications for permits for which preliminary approvals have been issued, applications for permits shall be deemed approved subject to insurance requirements as provided in this chapter, Section C.4.f., above, if no written denial is issued within fourteen days of the date on which the application is fully completed, executed and filed with the appropriate Officer or Employee, as designated by the General Superintendent; provided, however, the Park District may extend the period of review for an additional fourteen days by issuance of a written notice of extension. If, prior to the expiration of the extended review period, no written denial is issued, the application for permit shall be deemed approved.

d. Notice of Extended Review or Denial or Issuance of Permit.

Written notice of denial or notice of extension shall be served on the applicant by personal delivery, or by deposit in United States mail, with proper Postage prepaid, to the name and address set forth on the application for permit.

e. Contents of Notice; Grounds for Denial.

Notice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit. Where an application or permit has been denied because a fully executed prior application for the same time and place has been received, and a permit has been or will be granted to the prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area, the Park District shall propose an alternative place, if available for the same time, or an alternative time, if available for the same place. The Park District may deny an application for permit on any of the following grounds:

(2) the application for permit is not fully completed and executed;

(3) the applicant has not timely tendered the application fee, user fee, indemnification agreement, or security deposit;

(4) the application for permit contains a material

falsehood or misrepresentation;

(5) the applicant is legally incompetent to contract or to sue and be sued;

(6) the applicant or the Person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(7) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part hereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;

(8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

(10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;

(11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent;

(12) the applicant has not secured the requisite insurance; or

(13) the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to the applicant.

f. Amendment or Revision of Applications

Any amendment or revision of an application or permit shall for purposes of determining the priority of the application for permit, relate back to the original filing thereof; but the time in which the Park District shall grant or deny the application for permit and serve notice of such granting or denial shall be computed from the date of the amendment or revision.

6. Procedures for Review/Waivers.

a. Review by General Superintendent.

1. Any applicant who is denied a permit or a permittee who is assessed damages or a fine pursuant to this ordinance may, within seven days of the service of notice of such determination, file a written appeal from such determination with the General Superintendent;

2. The General Superintendent shall have seven days from the date on which the appeal was received in which to serve upon the applicant a notice that he/she has affirmed, modified or reversed the denial or fine;

3. Such notice shall be deemed served upon the applicant or permittee when it is personally delivered or when it is sent by United States mail, with proper postage prepaid, to the name and address set forth on the application for permit;

4. If such notice is not served upon the applicant or permittee within seven (7) days of the date upon which the appeal was filed, then the denial shall be deemed reversed.

b. Form of Appeals.

Any appeals filed pursuant to the ordinance shall state succinctly the grounds upon which it is asserted that the denial should be modified or reversed and shall be accompanied by copies of the application for permit, the written notice of the determination of the supervisor and/or the General Superintendent, and any other papers material to

the determination.

c. Waiver of Requirements.

Any requirements for use fees, deposits, proof of insurance or premium for insurance may be waived by the General Superintendent upon the recommendation of the General Counsel, if the activity as protected by the First Amendment of the United States Constitution and the condition would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity. Fees for equipment and services may not be waived pursuant to this subsection. Application for a waiver shall be made on a form prescribed by the General Superintendent.

7. Fines

The violation by a permittee of the terms of his/her a permit or the laws and regulations of the Park District shall subject the permittee to a civil fine of up to $500. Each day that a violation continues shall be deemed a separate violation. Such fines may be assessed against any security deposit held by the Park District on behalf of the permittee, pursuant to this chapter Section C.4.d., above, or may be assessed a fine for monies in excess of any security deposit held by the Park District. Any assessment of fines in excess of any security deposit shall be subject to the appeal provisions of this chapter, Section C.6., above. The Region Manager or his/her designee shall give the permittee prompt written notice of any fines to be assessed in excess of the security deposit. Such notice shall be served on the permittee by personal delivery, or by deposit in the United States mail, with proper postage prepaid to the name and address set forth on

the application for permit.

8. Severability.

If any provision of this ordinance or the application thereof to any person or circumstance be held invalid, the remainder of this ordinance and the application of such provision to other persons or circumstances shall not be affected thereby. The Park District reserves the power to amend or repeal this ordinance at any time; and all rights, privileges and immunities conferred by this chapter or by acts done pursuant hereto shall exist subject to such power.

PARK DISTRICT
COME OUT AND PLAY

Special Event Application

Exhibit B to Complaint

TYPE OF PERMIT
(Check one)

- ☐ Group
- ☐ Athletic Events
- ☑ Corporate/Festival
  - ☐ Level 1
  - ☐ Level 2
  - ☐ Level 3
- ☐ Media*
  - ☐ Non-news live or delayed broadcast
  - ☐ Commercial/movie picture/video
  - ☐ Still photography

*Media permits for live or delayed broadcast are strictly for broadcast. If broadcast entity is also sponsoring an event during its broadcast, the application will no longer be considered solely as a broadcast, but rather a corporate promotion; and a corporate permit must be obtained.

SPECIAL NOTE:
Permits are issued on a "first-come, first-served" basis. Your request for a date will not be considered unless the application fee is included with your application.

Security deposits will triple for applicants which have forfeited their security deposits at prior events.

FEES ENCLOSED:
(Check all that apply)

- ☒ Non-Refundable Application Fee
- ☐ User Fee
- ☐ Security Deposit
- ☒ Insurance Certificate
- ☒ For amendment waiver of Fee

Is your organization a not-for-profit?
☑ Yes ☐ No Not registered w/ the State of Illinois

If yes, you must attach a current verification of 501 (c) (3) status.

EVENT INFORMATION

You must include a site plan/race route for your event which must include the location of all equipment. This application will not continue processing without the information detailing your layout.

Name of sponsoring organization: Ad Hoc Coalition for Peace in the Gulf
Contact person/department: Robert MacDonald
Address: 2558 W. Armitage 60647
Phone: 773-486-8085
Fax: 773-227-2072
Name of event: TBA
Proposed date and location: Soldier Field
Date requested: May 10, 11
Time (begin & end): 10 AM - 11 PM each day
Time (begin & end): 10 each
Estimated size of event: 10,000
Event Contact & phone number: Robert MacDonald

SECURITY DEPOSIT REFUND TO:
Name: Robert MacDonald
Address: 2558 W. Armitage
City: Chicago State: IL 60647

ALL PERMITS ARE SUBJECT TO THE FOLLOWING PROVISIONS:

I will submit to all provisions that are Legal — Robert MacDonald 3/4/97

BEST AVAILABLE COPY

Park Permit—Special Event Application (continued)

Are you requesting a donation at your event?
☑ Yes ☐ No People don't mind paying for it.
If so, please indicate the amount: Suggested on contribution

Does your event require street closures?**
☐ Yes ☑ No

EQUIPMENT

TENTS

Will you be erecting tents or canopies?
☑ Yes ☐ No

If yes, describe: 20 x 10 — 2 — 5000 = 5200
Number: 50 — Size: 10 x 10 — Total square feet

(Any single tent or canopy measuring over 240 square feet will require a building permit from the City of Chicago.)

Tent Company Information
Name: Each group will be responsible for their own tent.
Address:
Contact:

STAGES

Number: 1 — Size: 25 x 10 — Total square feet: 250

INFLATABLES

Number: — Size: The list of the Ferrillo Bouncy would work Fine and we request it. — Total height feet:

(Please provide 1 entrance for each inflatable on a separate sheet.)

SOUND

Do you intend to have live music or amplified sound at your event?
☑ Yes ☐ No

If yes, please describe and include the hours.
12 - 10 pm.

NOTE: The Park District does not provide electrical service. Any amplified sound is subject to the City of Chicago Noise Ordinance (11-4-1100).

ANIMALS

Do you intend to have live animals at your event?**
☑ Yes ☐ No If yes, please explain:
Pets

RIDES

Do you intend to have mechanical rides at your event?**
(Inflatable rides are only allowed as listed herein.)
☐ Yes ☑ No If yes, please explain:

VENDORS

The Chicago Park District has an exclusive agreement with Chicago Management Associates, L.L.C. for concession operations. Will you be requesting a waiver to vend food or merchandise at your event?

If so, you will be required to fill out and submit a waiver request form.

ALCOHOL

Are you requesting permission to include beer or wine vendors at your event?**
☐ Yes ☑ No

Are you requesting permission to give away beer or wine?**
☐ Yes ☑ No

NOTE: Dramshop or host liquor liability insurance of $1 million will be required if alcohol is sold or served.

** A copy of all city licenses and permits must be submitted at the time user fees are due. You must also apply with the Department of Revenue 121 North LaSalle Street, City Hall – Room 107.

PARKING

Parking vehicles on grass or service roads is strictly prohibited. Provisions for parking are not included in the issuance of any Chicago Park District Special Event Permit.

CANCELLATIONS

Must be done in writing 14 days prior to the event for a full user fee refund. (Group permits only)

BEST AVAILABLE COPY

STATE OF ILLINOIS)
)
COUNTY OF COOK)

AFFIDAVIT IN SUPPORT OF FIRST AMENDMENT CLAIM FOR WAIVER OF PARK DISTRICT INSURANCE REQUIREMENT OR FEE

I, Robert McDonald, being duly sworn, do hereby state as follows:

1. I am the applicant or an officer of the applicant for a Chicago Park District permit, a copy of the application for said permit is attached hereto.

2. I am requesting that the Board of Commissioners waive the insurance requirement of $ 1 million each occ/agg and/or the use fee of $ 525 a day + 1050 security dep.

3. I believe that the activity for which this permit is requested is protected by the First Amendment to the United States Constitution because: (describe)
This is a rally based on the theme of Drug Policy Reform.

4. I have reviewed the list of insurance companies provided by the Park District, have contacted agencies regarding policy prices, and believe that the insurance requirements described in paragraph 2 are so financially burdensome that they would preclude me/my organization from using Park District property for the proposed activity.

5. The user fee for this event is so financially burdensome that it would preclude me/my organization from using Park District property for the proposed event.

6. In support of this claim, I have attached financial information which I would like the Park District to consider in review my waiver request.

7. If the insurance requirement is waived, a Hold Harmless Agreement, in the form attached hereto will be provided to the Park District no later than twenty-four (24) hours prior to the permitted event.

Subscribed and Sworn to before me this 5 day of 3 199 7

OFFICIAL SEAL
GWEN DANCY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 07/11/00

Notary Public

Robert McDonald
Affiant

Midwest Coalition for Drug Law Reform
Organization

I, Robert MacDonald submitt
as an organization at this moment (3
we have no money and we will
no money in the future.

Robert MacDonald

EXHIBIT C TO COMPLAINT

CHICAGO
PARK
DISTRICT

–

COME OUT AND PLAY

March 12, 1997

Robert MacDonald
2558 West Armitage
Chicago, IL 60647

Re: *Special Event Application for Park permit - May 10-11, 1997*

Dear Mr. MacDonald:

This is to advise you that your application for a Park Permit - Special Event, for Petrillo Bandshell and Butler Field on May 10 and 11, 1997, to hold a rally for the "Ad Hoc Coalition for Drug Law reform," has been denied. Denial is based on the following grounds:

1) In August 1996 you received two permits on behalf of the Festival of Life and Yippie! Festival of Life. As more fully explained in my letter to you dated September 17,1996, you violated the terms of those permits in multiple respects and misrepresented the nature and scope of your intended activities.

2) Your application for permit is incomplete or incorrect. While you state that your organization is a

not-for-profit, you also stated that it is not registered as such. The application requires that if you are applying as a not-for-profit, you must attach a current verification of section 501(c)(3) status.

3) As best we can determine the entity upon whose behalf the application has been filed, the Ad Hoc Coalition for Drug Law Reform, is not legally competent to contract and therefore is not a proper applicant.

Further, even if your application were accepted, your request for waiver of insurance requirements and security deposit would also be denied. Based on last year's experience, we are not willing to run the risk to taxpayers' money that would be caused by your proposed gathering without the necessary insurance and security deposit. As you know, your entire security deposit had to be withheld last time, and a security deposit is necessary to ensure that the Park District does not incur additional expenses. If your application were accepted, you would also have to supply additional information to support your request for a waiver of user fees. We would need a more detailed explanation of the purpose of the rally and what First Amendment rights are impacted.

Pursuant to Chapter VII, Section C(6) of the Code of the Chicago Park District, you have seven days from the receipt of this notice to file a written appeal to the General Superintendent of the Park District. Any such appeal should state the grounds upon which you believe the denial should be modified or reversed, and should be accompanied by copies of your application for permit, this letter, and any other documents that are material to the

determination.

Sincerely yours,

(Signature)

Joan Fencik
Deputy General Counsel

JF/nm

EXHIBIT D TO COMPLAINT

To: General Superintendent, Chicago Park District
Fr: Robert Mac Donald Ad Hoc Coalition for Drug Law Reform
Re: Appeal from March 13,1997 Permit Denial
Dt: March 18,1997.

APPEAL

I hereby appeal from the denial of a permit application which I filed on March 5, 1997. That application is attached hereto as Exhibit A, and the denial dated March 12,1997 and signed by Deputy General Counsel Joan Fencik is attached hereto as Exhibit B. It was transmitted to me on March 13,1997. My responses to the stated reasons for denial, numbered accordingly, are as follows:

1. I did not receive the September 17, 1996,
letter which Ms. Fencik mentions until after I received the denial of this permit application. In any event, Ms. Fencik does not particularize any of the alleged "violations" of an earlier permit or any of the alleged "misrepresentations" in connection with an earlier application. It is therefore difficult to respond or to assess whether they are "material" as even your own code requires or whether they can constitutionally form a basis for restraining future expression

in advance. If there were problems with a past event, those problems can no doubt be avoided from learning from the past and planning better now and in the future. None of Ms. Fencik's suggestions involve uncompensated damage to park property, and none involve anything which will necessarily be repeated at this event. Beyond this:

a) We had agreed to use the security deposit to pay the balance due for the "portapotties" to which Ms. Fencik refers. I fail to see how this amounted to any violation. Ms. Fencik certainly did not so inform me at the time, and she does not make this clear even now.

b) The Park District never informed me of any additional expenses in connection with the underground restrooms. I am not aware that they were ever, in fact, opened, in connection with the even to which Ms. Fencik refers. We were disappointed that they were never made available to us.

c) Similarly, no one ever asked for reimbursement of any additional expenses in connection with cleaning the stage and seating area. Butler Field itself was left in a clean condition, and so were these areas as far as I know. These areas would have been further cleaned if anyone had brought alleged problems to our attention.

d) With respect to "persons consuming alcohol," Ms. Fencik does not say who this was and how I can be held responsible for this. I doubt that you hold other park users strictly liable for

unauthorized beer consumption at their events. When Ms. Fencik brought a particular concern in this regard to my attention, I immediately saw to it that the problem was resolved.

e) Ms. Fencik permitted the vendors to which she refers. In fact, she took fees from those vendors for their use of Butler Field in August 1996. I also obtained appropriate permission for these vendors from the Park District's concessionaire and his client.

f) The approved vendors were also allowed to use their vehicles to set up and take down their tables and wares, and Ms. Fencik herself approved the positioning of two floats and the sound truck.

g) The tents and canopies were also permitted by Ms. Fencik, as her own handwriting on a site plan indicates.

h)The generator was positioned in cooperation with the Park District employees and Chicago Police Officers on the scene at the time it was brought in. The alternative location designated by Ms. Fencik would not have resolved the problems which she raised. Better coordination in the future can easily avoid this type of problem, and it hardly affords a reason to deny a permit for future expression.

2. Ms. Fencik's second ground for denial assumes that an organization must be exempt from federal income taxation under Section 501(c)(3) of the Federal Revenue Code before it is properly characterized as "not-for-profit." That is wrong as a matter of law. Many not-for-profit organization have no need for any federal tax exemption on their income and many others obtain exemptions under

other subsections of Section 50 I. If, on the other hand, the Park District intends to impose disabilities upon not-for-profits which are not exempt under Section 501(c)(3), it would raise serious constitutional concerns. For instance, at least one event, the Gore campaign rally, took place in Grant Park during the convention week last August which could not have been held at the behest of any 501 (c)(3) organization. We, of course, would object to any discrimination or otherwise improper treatment of non-501(c)(3) not-for-profit organizations. In any event, the application is not incomplete. We are not exempt from federal taxation under Section 501(c)(3).

3. The Ad Hoc Coalition for Drug Law Reform is an unincorporated association composed of individuals and other organizations which have a common purpose in drug law/policy reform. It is a growing coalition. If it cannot apply for a permit because it is incompetent to contract in its own name, it will be a simple matter to substitute a natural person with such capacity as the applicant. I am puzzled that Ms. Fencik never offered that as an alternative pursuant to the provisions of your code governing permit denials. In any event, I have this day submitted an amended application in my own name which fully cures whatever defect the original contained in this regard. See Exhibit C hereof.

Further, Ms. Fencik's comments concerning her contemplated denial of my request for a First Amendment waiver of security deposit and fees are also in error. I do not believe that a decision on a First Amendment waiver can properly be predicated on unspecified "last year's experience." Since Ms. Fencik has not specified what she means in this

regard, I cannot comment further at this time. I would be happy to respond to any details which she might raise. Similarly, although it appears to me that "a rally based of the theme of Drug Policy Reform" sufficiently establishes the First Amendment nature of the gathering, I would be happy to provide further details if Ms. Fencik has any further questions. I can easily answer the only specific question she poses: First Amendment free speech rights are "impacted" here.

Robert MacDonald

EXHIBIT E TO COMPLAINT

Chicago
Park
District
Come Out And Play

Forrest Claypool
General Superintendent and CEO
Chicago, IL 60605
FAX: (312) 747-6127
T.D.D.: (312) 427-3304
Voice: (312) 747-2657

425 East McFetridge Drive

March 24, 1997

Robert G. MacDonald
2558 West Armitage
Chicago, IL 60647

RE: Special Event Application for Park permit - May 10-11, 1997

Dear Mr. MacDonald:

This is to advise you that your appeal of the denial of your application for a Park Permit Special Event, for Petrillo Bandshell and Butler Field on May 10 and 11, 1997, to hold a rally for the " Ad Hoc Coalition for Drug Law Reform, " has been denied and the prior decision has been affirmed. In deciding your appeal, I have reviewed your application, the denial of that application, your March 18, 1997 appeal, all of the documents attached to that appeal, your prior applications, and other documents relating to the prior events. I have also spoken with Joan

Fencik about the circumstances surrounding your application and the prior events. Denial of your appeal is based on the following grounds, in the same order as contained in your March 18, 1997 appeal:

1) You state in your appeal that you did not previously receive the September 17, 1996 letter concerning the problems arising out of your previous permits. Ms Fencik assures me that the letter was mailed to the correct address. She also indicated that you admitted to her that you do not always receive mail sent to you at your address because "a lot of people live there. " We cannot be responsible for your not receiving a letter sent to the address that you have provided to us as your official address, and this certainly cannot be grounds for your appeal. Even if you did not receive the September 17, 1996 letter , the facts stated therein are not changed.

You state that Ms. Fencik did not particularize any of the alleged violations or misrepresentations in connection with your earlier applications. Her March 12, 1997 letter denying your permit application makes specific reference to the September 17, 1996 letter that enumerated some of the violations and misrepresentations. As explained in that letter, your previous permit for the Festival of Life was violated by (1) persons consuming alcohol, (2) unpermitted vendors; (3) unpermitted vehicles, including some driving on the grass; (4) unpermitted tents and canopies; and (5) improper placement of your generator, in violation of the Fire Code. In addition, the letter points out that your permit for the Yippie! Festival of Life was also violated by persons remaining in the park after 11 :00 p.m. each night, contrary to the Ordinance. In fact, your Yippie! Festival of Life permit application stated that it was

restricted to 9:00 p.m. nightly.

After further investigation, it appears that you violated both of your prior permits in other respects as well. From the very first, you violated your permits by parking a semi-trailer tractor next to the Petrillo stage. The permit application specifically states that this is not allowed. Additionally, multiple cars and trucks were driven across the grass, both as part of your parade, and by vendors. Your permit application specifically states that this automatically revokes your permit. Without authorization or approval, you removed seating and never returned it to its original position. The Park District had to pay to have the seats returned after your festival concluded.

Some of the above violations also constitute misrepresentations in your prior permits. For example, you represented that you would be using the parks until 11 :00 p.m. and 9:00 p.m. respectively, yet you remained well after that time each night. You stated in your permits that there would not be alcohol sold or given away, yet alcohol was consumed in violation of section B(7) of the Park District Ordinance.

a) You contend that you agreed to the Park District's use of your security deposit to pay the balance due for the "porta-potties," and thus your financial obligations were fulfilled. This did not satisfy your financial obligations or fully reimburse the Park District for the damages caused by your festivals. According to Ms. Fencik, on August 24, you agreed to pay $4000 for the toilets but paid only $2500 on that day. When the festival was concluding she told you that additional amounts were owed for the toilets and other expenses, and you stated that you and your organizations had no more money and

could not pay anything over and above the security deposit. The Park District incurred additional expenses to clean the underground bathrooms at Petrillo Bandshell, to clean the stage and seating area at Butler Field, and to restore the seating area.

b) The underground restrooms were in fact opened on August 24 during your festival because you had made no arrangements for toilets. The Park District paid the bill for cleaning those restrooms on August 24, 1996.

c) I have been informed that although the grassy area was left relatively clean, the stage area of Butler Field smelled of urine and had to be power washed after your festival.

d) Ms. Fencik indicates that when a particular person's consumption of alcohol was brought to your attention, you did have that person stop drinking. .However, there were no other attempts by you or your organization to check the use of alcohol or drugs. It was your responsibility, not the Park District's, to ensure that alcohol and drug consumption did not take place during your festival. You did not do so.

e) Both of your prior permit applications stated that there would be no vendors. Yet, at both festivals there were numerous vendors of clothes and trinkets. Apparently, on the last day of the event, you submitted a partial list of vendors, and some money. This does not excuse the misrepresentations on your permit applications or your failure to obtain permits for vendors. Neither Ms. Fencik nor the Park District approved these vendors.

f) According to Ms. Fencik, the sound truck was initially parked next to the stage without permission. After the truck was moved later in the day on August 24, and it became apparent that you had made no arrangements for secure parking, the Park District allowed the truck to be moved back to the seating area when your sound man stated that he would remove his equipment from the stage and leave rather than park the truck in an unsecured area. This accommodation allowed your festival to continue. Again because of lack of planning on your part, you were advised that one float, which you had made no arrangements to park elsewhere, could be in the park on "Environmental Justice Day. " There was not approval of any other float, and the one float remained beyond the approved day, until the Park District threatened to have it forcibly removed.

g) While tents were permitted, they were not placed at the agreed locations, and City permits were not obtained as required.

h) The generator location is clearly marked on the site plan attached to your appeal. However, you actually placed the generator on the opposite side of the building, with wires across the only ingress and egress to the bandshell. This was in violation of the Fire Code. The generator was not positioned there with guidance from the Park District or the Chicago Police. You were repeatedly asked to move the generator, but did not.

2) The not-for-profit designation on the permit application, and the requirement of a section 501(c)(3) certificate is to provide objectivity with respect to reduced fees, rather than allowing that decision to be left to the discretion of whoever

processes the application. The Park District has a separate fee schedule for a section 501(c)(3) organization. Thus, in order to obtain a reduced fee, the applicant must have 501(c)(3) status. Again, your lack of such certification does not preclude you from obtaining a permit, but it does preclude you from the reduced fees.

3) You correctly point out that the defect in applicant can be cured by submitting an application in the name of a different organization or person. However, your amended application does not cure the other deficiencies in your application, most notably the violation of prior permits. This remains true whether the applicant is your ad hoc committee, you individually, or any other applicant who submits an application on your behalf. Until the previous violations and misrepresentations are fully addressed and resolved, the Park District will deny you a permit.

Fee Waivers - As discussed above, the amount of the user fee is set by Park District uniform fee schedule. Since your organization does not have 501(c)(3) status, the ordinary fee schedule applies to your permit and the user fee of $8000/day would be required to be paid no later than 30 days prior to the event.

You also seek a waiver of the security deposit and insurance certificate. Surprisingly, your appeal suggests that you do not understand what Ms. Fencik is referring to when she alludes to "last year's experience." To make it perfectly clear, last year's experience refers to the Festival of Life and Yippie! Festival of Life events that you staged. As discussed in more detail above, those festivals required the Park

District to retain the entire $1500.00 security deposit to fulfill your obligation to Waste Management, and to incur additional expenses that have not been recovered. The potential exposure to the Park District also would require me to insist on the full insurance certificate. The applicable security deposit, in accordance with the Park District's Uniform schedule, is $2500.00. The amount of insurance required is also set by a uniform schedule of insurance guidelines. Your event would require a certificate of insurance in the amount of $1,000,000.00.

The two permits that you submitted in 1996 make it very clear that there are various actions that result in the revocation of your permits and the denial of further permits. It is expressly stated that failure to comply with the alcohol consumption requirements automatically revokes the permit, as does driving or parking motorized vehicles on the grass.

The permit applications state that you are responsible for your vendors and patrons and that you, and they, must comply with all Park District and City of Chicago Ordinances and rules. And, the permit applications state unequivocally that "violation of the terms of this permit shall be grounds for denial of all future permit applications." The Park District Code contains this same provision.

Very truly yours,

Forrest Claypool

Forrest Claypool
General Superintendent

/nm
c: Joan Fencik

EXHIBIT F TO COMPLAINT

To: General Superintendent, Chicago Park District
Fr: Robert Mac Donald / Ad Hoc Coalition for Drug Law
Re: Reform Appeal from March 13,1997 Permit Denial
Dt: March 18, 1997.

AMENDED APPEAL

I hereby appeal from the denial of a permit application which I filed on March 5, 1997. That application is attached hereto as Exhibit A, and the denial dated March 12, 1997 and signed by Deputy General Counsel Joan Fencik is attached hereto as Exhibit B. It was transmitted to me on March 13, 1997. My responses to the stated reasons for denial, umbered accordingly, are as follows:

7. I did not receive the September 17, 1996, letter which Ms. Fencik mentions until after I received the denial of this permit application. In any event, Ms. Fencik does not particularize any of the alleged "violations" of an earlier permit or any of the alleged "misrepresentations" in connection with an earlier application. It is therefore difficult to respond or to assess whether they are "material" as even your own code requires or whether they can constitutionally form a basis for restraining future expression in advance. If there were problems with a past event, those problems can no

doubt be avoided from learning from the past and planning better now and in the future. None of Ms.Fencik's suggestions involve uncompensated damage to park property, and none involve anything which will necessarily be repeated at this event. Beyond this:

a) We had agreed to use the security deposit to pay the balance due for the "portapotties" to which Ms. Fencik refers. I fail to see how this amounted to any violation. Ms. Fencik certainly did not so inform me at the time, and she does not make this clear even now.

b) The Park District never informed me of any additional expenses in connection with the underground restrooms. I am not aware that they were ever, in fact, opened, in connection with the event to which Ms. Fencik refers. We were disappointed that they were never made available to us.

c) Similarly, no one ever asked for reimbursement of any additional expenses in connection with cleaning the stage and seating. Butler Field itself was left in a clean condition, and so were these areas as far as I know. These areas would have been further cleaned if anyone had brought alleged problems to our attention.

d) With respect to "persons consuming alcohol, " Ms. Fencik does not say who

this was and how I can be held responsible for this. I doubt that you hold other park users strictly liable for unauthorized beer consumption at their events. When Ms. Fencik brought a particular concern in this regard to my attention, I immediately saw to it that the problem was resolved.

e) Ms. Fencik permitted the vendors to which she refers. In fact, she took fees from those vendors for their use of Butler Field in August 1996. I also obtained appropriate permission for these vendors from the Park District's concessionaire and his client.

f) The approved vendors were also allowed to use their vehicles to set up and take down their tables and wares, and Ms. Fencik herself approved the positioning of two floats and the sound truck.

g) The tents and canopies were also permitted by Ms. Fencik, as her own handwriting on a site plan indicates.

h) The generator was positioned in cooperation with the Park District employees and Chicago Police Officers on the scene at the time it was brought in. The alternative location designated by Ms. Fencik would not have resolved the problems which she raised. Better coordination in the future can easily avoid this type of problem, and it hardly

affords a reason to deny a permit for future expression.

i) Finally, I was not present in Lincoln Park for the violations which Ms. Fencik alleges. She and others had many discussion about those matters at and prior to the time, and it is disingenuous for her to raise these matters now as "violations" of the permits with which I was involved. All of my activities in Lincoln Park ended well before the park closed, and I did not encourage anyone to stay in the park after that time.

2. Ms. Fencik's second ground for denial assumes that an organization must be exempt from federal income taxation under Section 501(c)(3) of the Federal Revenue Code before it is properly characterized as "not-for-profit." That is wrong as a matter of law. Many not-for-profit organization have no need for any federal tax exemption on their income and many others obtain exemptions under other subsections of Section 501. If, on the other hand, the Park District intends to impose disabilities upon not-for-profits which are not exempt under Section 501(c)(3), it would raise serious constitutional concerns. For instance, at least one event, the Gore campaign rally, took place in Grant Park during the convention week last August which could not have been held at the behest of any 501(c)(3) organization. We, of course, would object to any discrimination or otherwise improper treatment of non-501 (c)(3) not-for-profit organizations. In any event, the

application is not incomplete. We are not exempt from federal taxation under Section 501(c)(3).

3. The Ad Hoc Coalition for Drug Law Reform is an unincorporated association composed of individuals and other organizations which have a common purpose in drug law/policy reform. It is a growing coalition. If it cannot apply for a permit because it is incompetent to contract in its own name, it will be a simple matter to substitute a natural person with such capacity as the applicant. I am puzzled that Ms. Fencik never offered that as an alternative pursuant to the provisions of your code governing permit denials. In any event, I have this day submitted an amended application in my own name which fully cures whatever defect the original contained in this regard. See Exhibit C hereof.

Further, Ms. Fencik's comments concerning her contemplated denial of my request for a First Amendment waiver of security deposit and fees are also in error. I do not believe that a decision on a First Amendment waiver can properly be predicated on unspecified "last year's experience." Since Ms. Fencik has not specified what she means in this regard, I cannot comment further at this time. I would be happy to respond to any details which she might raise. Similarly, although it appears to me that "a rally based of the theme of Drug Policy Reform" sufficiently establishes the First Amendment nature of the gathering, I would be happy to provide further details if Ms. Fencik has any further questions. I can easily

answer the only specific question she poses: First Amendment free speech rights are "impacted" here.

Robert MacDonald

Exhibit G to Complaint

CHICAGO PARK DISTRICT
425 EAST McFETRIDGE DRIVE
CHICAGO, ILLINOIS 60605

FORREST CLAYPOOL
GENERAL SUPERINTENDENT AND CEO

Office: 312-747-2657
Fax: 312-747-6127
TDD: 312-427-3304

March 26, 1997

Robert G. MacDonald
2558 West Armitage
Chicago, 1L 60647

RE: Permit Application-May l0-ll, 1997

Dear Mr . MacDonald :

For the reasons stated in my letter to you dated March 24, 1997, your Amended Appeal is denied. In response to your new paragraph 1 (i), you were the permittee on the Lincoln Park permit, and were responsible for ensuring that all requirements of the permit were met. Your failure to be on site to supervise your own event does not excuse the permit violations.

Very truly yours,

Forrest Claypool
General Superintendent

cc: Joan Fencik
[AMENDED ORDINANCE]

CHAPTER VII. USE OF PARKS. DEFINITIONS.

SECTION A.

For purposes of this chapter, the following words, terms, phrases and their derivatives shall have the meanings set forth in this section. When not inconsistent with the context, the present tense shall include the future tense; the plural shall include the singular number and the singular number shall include the plural number.

"Amplified Sound" means any sound projected or transmitted by artificial means, including, but not limited to, loudspeakers, amplifiers, powered megaphones or any similar devices.

"Horse" means any member of the equine family.

"Parade" means any march or other organized movement of persons from place to place, or about a place.

"Pollute" means to perform any act or acts destroying, contaminating, fouling or otherwise altering the physical, topographic, chemical or biological properties of a park, including land, waters, buildings, furnishings, equipment, vegetation and animals, including, but not limited to, the deposit of garbage, litter or water matter; changes in the temperature, taste, color, turgidity or odor of water; the discharge of any liquid, gas, solid, radioactive or other substance in any park which causes, or is likely to cause, a public nuisance or an injury to the public health, safety or welfare, or injury to vegetation or animals, or otherwise impair the safe, healthful and beneficial

use of a park.

"Stallion" means a male horse, not castrated

SECTION B. RULES GENERALLY

1. Violation of State or Federal Laws.

No person shall commit a violation of this Code, or local, state or federal laws or regulations while on Park District property.

2. Park Hours.

No person shall be or remain or leave any vehicle in any part of any park which is fenced in or provided with gates, between the closing of the gates at night and their reopening on the following day; nor shall any person be or remain or leave any vehicle in any park not fenced in or provided with gates, between the hours of 11 :00 p.m. and 6:00 a.m. on the following day, except that:

a persons and vehicles may pass through such parks without stopping on the more direct walk or driveway leading from their point of entrance to the exit nearest to their point of destination;

b. persons may pass through the parks without stopping to place or remove a vehicle from a Park District garage or lot;

c. persons may occupy boats property moored in Park District harbors and allow their vehicles to remain at such time in Park District garages or lots designated by the General for mooring permittees;

d. persons may pass through such parks without stopping to occupy a boat property moored in a Park District harbor;

e. persons and vehicles may pass through or occupy a park for a Park District sponsored activity; and

f. vehicles may remain in Park District garages or lots which by order of the General Superintendent remain open after the park closing hours.

3. Restricted Areas.

a. Entering Prohibited Areas.

No person shall enter upon any portion of the Park System where persons are prohibited from going by direction of the General Superintendent, as indicated by sign or notice.

b. Entering Unfinished Areas.

No person shall enter upon any part of the Park System which is in an unfinished state or under construction.

c. Entering Building or Areas Closed to Public or Scheduled for Specific Group or Activity .

No person shall enter or attempt to enter any building or area in the Park System if or when it is closed to the public, if a permit has been issued for use of it by an individual or group, unless invited by said individual or group, or if a permit is required for use.

d. Use of Rest Rooms and Comfort Stations.
No person shall fail to cooperate in maintaining restrooms and washrooms in a neat and sanitary

condition. No person over the age of four years shall use the restrooms designated for the opposite sex. No person under the age of four years shall use any restroom unless accompanied by a person over the age of eighteen.

e. Playgrounds Designated for Persons under Twelve Years of Age.

No person the age of twelve years or older shall use playground equipment designed for persons under the age of twelve years.

4. Entering or Remaining in Waters.

No person shall enter or remain in any waters of the Park System except as herein provided.

a. Pools and Natatoria

Entering or remaining in park swimming pools and natatoria designated for swimming shall be permitted on such days, at such times and subject to such rules and regulations as prescribed by the General Superintendent

b. Lake Michigan, Humboldt Park and Douglas Park Beaches and Adjacent Waters.

(1) Authorized Beaches

Entering or remaining in the waters of Lake Michigan adjacent to or in the lands of the Park District shall be permitted only at the following authorized bathing beaches:

Calumet
Rainbow
South Shore
67th Street
64th Street
57th Street
51st Street
49th Street
31st Street
74th Street
Albion Avenue
Ardmore-Hollywood
Columbia Avenue Fargo
Fullerton Avenue
Howard Avenue
12th Street
Ohio Street
Oak Street
North Avenue
Montrose Avenue
Foster Avenue
Loyola (Greenleaf Avenue)
Touhy
Juneway Terrace
Loyola Avenue
North Shore Avenue
Pratt Boulevard
Rogers Avenue
Eastlake Terrace
Thorndale Avenue
Humboldt Park Avenue
Douglas Park Beach

(2) Authorized Times.

Entering or remaining in the water at said beaches shall be permitted only during the bathing season established by the General Superintendent. The General Superintendent may extend or shorten said bathing season at some or all beaches or parts thereof and may eliminate beaches or parts thereof from said designated bathing beaches, during the bathing season with due regard for weather conditions and the safety of the public during said bathing season. No person shall enter or remain in the water at any of the authorized bathing beaches:

(a) between the hours of 9:30 p.m. and 9:00 a.m.;

(b) during storms or in dangerous or unauthorized areas including, without limitation, areas at which no swimming

and/or no diving signs or symbols are posted or otherwise displayed;

(c) more than fifty yards from the shore line of the bathing beach; or

(d) when closed by order of the General Superintendent or his/her designee.

No person shall dive into the water at any authorized bathing beach, or into the water adjacent to any lands of the Park District, if said water is five feet deep or less or where no swimming or no diving signs or symbols are posted or otherwise displayed.

(3) Prohibited Activities.

(a) no person shall ride, drive, or transport any bicycle or motor vehicle upon a bathing beach, except where racks for the storage of bicycles are provided by the Park District bicycles may be stored in said racks.

(b) Except in locations designated for such purpose, no person shall engage in any athletic game or sport or in any activity upon a bathing beach or in the water, when injury or inconvenience to himself/herself or others might result therefrom.

(c) No person shall conduct himself/herself upon any bathing beach or in the water in such a manner as to jeopardize the safety

and health of himself/herself or others.

(d) No person shall change clothes except in beach houses or other enclosed places furnished by the Park District.

(e) No person shall swim, dive or enter the water fronting any bathing beach while wearing or carrying an air or gas tank or tanks for the purpose of underwater breathing in the activity commonly known as skin or scuba diving.

(f) Notwithstanding the provisions of this chapter, Section B.4.b.(3)(e), above, skin or scuba diving shall be permitted at such locations as shall be designated by the General Superintendent and subject to such rules and regulations pertaining to the safety of the participants and the public as the General Superintendent shall prescribe.

(g) No person or persons shall use any artificial floats of any kind or description in any park waters.

(h) No person shall carry on unnecessary conversation with lifeguards; or falsely call for help or assistance; or stand or sit upon or cling to any lifeguard perches or light towers; or, except in an emergency, go into or cling to any lifeguard boats.

5. Injury to or Destruction of Park Property

No person shall in any park:

a. destroy, cut, break, deface, mutilate, injure, disturb, sever from the ground or remove any sod, earth or growing thing including, but not limited to, any plant, flower, flower bed, shrub, tree, growth, or any branch, stem, fruit, or leaf thereof; or bring into or have in his/her possession in any park any tool or instrument intended to be used for the cutting thereof, or any garden or agricultural implements or tools which could be used for the removal thereof except as approved and allowed by permit;

b. set fire to any trees, shrubs, plants, flowers, grass, plant growth or living timber, or suffer any fire upon land to extend into park lands;

c. go upon any lawn, grass plot, planted area, tree, shrub, monument, fountain, sculpture or structure where access is prohibited by signs or symbols which are posted or otherwise displayed or where access is restricted by fence or other physical barrier;

d. cut, break or in any way injure, deface, destroy or alter any building, fence, monument, sculpture bridge, or other structure or property contained therein;

e. operate or drive any motor car, automobile or vehicle of any kind in the Park System in places other than roadways or in such a manner as to cause the same to collide with, run against, strike or cause to strike, injure, deface or damage any park property

or appurtenance of any kind;

f. fasten any animal or attach any rope, sign, handbill or other things to any tree or shrub or to any protective device around any tree or shrub growing in the Park District;

g. allow any animal to injure or deface any tree, plant, shrub, lawn or grassplot in any manner whatsoever;

h. fasten any bicycle, motor cycle, moped or other vehicle to or leave the same standing so as to injure any tree, shrub, lawn or grass plot; or

i. deface, destroy, cover over or otherwise make unreadable any warning or prohibitory sign or symbol on park property.

6. Fires.

No person shall light or make use of any fire in the Park District except at fires for cooking purposes may be made in portable metal containers or grills under such regulation as may be prescribed by the General Superintendent. The General Superintendent shall designate areas in the parks in which grilling will not be permitted. Areas where grilling is permitted shall be equipped with special containers for deposit of charcoal and shall have access to water. The General Superintendent shall institute a program informing Park patrons of the danger to the health of trees and shrubs caused by depositing charcoal

near them. Any such fire shalt be continuously under the care and direction of a competent person over eighteen years of age from the time it is kindled until it is extinguished. No fire shalt be built within ten feet of any tree or building, or beneath the branches of any trees or in any underbrush. Every person who starts any such fire and every person starting or using such fire shalt completely extinguish fire or fires before leaving such park and shall dispose of any residue or refuse therefrom in an appropriate container. Cigars, cigarettes, charcoal bricquets and matches shall be extinguished and deposited in a suitable container provided for the reception thereof.

7. Alcoholic Beverages.

No alcoholic beverages shall be sold, brought within, given away, delivered or consumed on park property , except pursuant to permits or concessions issued pursuant to this Code.

8. Games and Sports.

No person shall engage in any athletic game or sport in the Park System except such portions thereof as may be designated for that purpose by the General Superintendent, and then only under such rules and regulations as may be prescribed by him/her .

a. Skating, Sledding, Skiing in Reckless Manner

No person shall skate, skateboard, sled or ski in any part of the Park System in a reckless

manner, or at the speed greater than is reasonable and proper, having due regard to the number of people in such part of the Park System and the use thereof, or so as to endanger life or limb, or damage the property of any person; provided, however, that nothing herein contained shall be construed to prohibit any exhibition of, or contests in, fast or fancy skating on such portions of any ice pond or rink as may be set aside for that purpose by the General Superintendent or his/her designee. Skating of all types, including, but not limited to, roller skating, skateboarding and cycling shall be prohibited at all times within the confines of the Lincoln Park Zoo Area.

b. Golf.

All persons are hereby prohibited from practicing and playing golf upon the playgrounds or parks of the Park District except upon the designated public golf links of Park District at the times and in the areas as may be designated by the General Superintendent.

c. Bicycling.

Persons may operate a bicycle only on paths, trails, roadways or other areas designated for bicycle use. Persons operating bicycles must ride on the right-hand side of such path, trail, roadway or other area designated for bicycle use by the General Superintendent. No person may operate a bicycle while carrying another person on the handlebars, frame or fender, or

so ride on a bicycle, except in a suitable seat attached to such bicycle for such purpose. No person may operate a bicycle in a reckless manner so as to endanger pedestrians. No person shall cling or attach himself/herself or his/her bicycle to any other moving vehicle. The operator of a bicycle shall yield the right-of-way to all pedestrians on walkways and to all vehicles on roadways, and shall walk his/her bicycle in all areas where riding is prohibited by the General Superintendent, as indicated by sign or notice. The operator of a bicycle shall give an audible warning, by horn, bell, voice or otherwise, when approaching any pedestrian from behind.

9. Day Camps.

Day camps, play classes or organized groups not sponsored by the Park District may use facilities of the Park System when not in conflict with the Park District recreational program, with the approval of the General Superintendent.

10. Bringing Animals in Park

a. Animals Permitted.

No person owning or being custodian or having control of any animal shall cause or permit such animal to enter or remain on Park District property, except

(1) a domestic animal may be brought into a park so long as such animal is continuously restrained by a leash not exceeding six feet in length and

such animal does not enter or remain in any building, zoo, playground, bathing beach, harbor, lagoon, swimming pool, spray pool, garden, athletic field, animal or bird refuge, or other areas that may be designated by signs as prohibited areas; and

(2) Horse, except for a Stallion, may enter or remain on Park District property as provided by a permit issued pursuant to this chapter, Section C, or concession permit issued pursuant to Chapter IX.

(3) subject to the permit, indemnification, reimbursement and insurance requirements enunciated in Chapter VII., Section C of this Code, a permittee may bring onto park property a tame, non-domestic animal for limited noncommercial or promotional purposes, so long as the animal is being supervised and controlled or restrained.

Nothing in this Code shall prohibit a dog assisting a sight-impaired person from entering or remaining at any location in the Park System or a person from bringing a dog to a dog-obedience event or a charitable organization from bringing onto park property a tame, non-domestic animal for limited non-commercial, promotional purposes, so long as the animal is being supervised and controlled or restrained or any animal together events for which a permit has

been issued pursuant to this chapter, Section C., below. No person having the care or charge of any dog, cat or other domestic animal shall permit such animal to enter or drink the water of any drinking fountain, pool, lake or pond in any park except at places designated or maintained therefor.

b. Animal Nuisance.

No person having the right and ability to prevent shall, knowingly or carelessly or negligently, permit any dog, cat or other animal to commit any nuisance upon any sidewalk or parkway of any public way in the Park District; or upon any public parks, public beaches, harbors or other public grounds and the buildings thereon excepting the roadway of any public way; nor shall any such person omit to do any reasonable and proper act, or take any reasonable and proper precaution, to prevent any such dog or other animal from committing such a nuisance in, on or upon any of such places or premises herein specified. Any person having the custody or control of any dog, cat or other domestic animal shall have the responsibility for cleaning up any feces of the animals and to dispose of such feces in a sanitary manner.

c. Animal at Large.

Any animal found at large in the Park System may be seized and impounded or disposed of pursuant to the laws or ordinances of the City of

Chicago in relation to the disposal of stray animals on the highways or other public places. Any animal found within the Park System in violation of this chapter may be apprehended, removed to the animal shelter, public pound, or any other place provided for that purpose, and impounded, all at the expense of the owner.

11. Animals Owned by the Park District.

No person shall within any park molest, kill, wound, trap, snare, hunt, take, chase, shoot or throw missiles at, remove or have in his/her possession any animal or animal habitat including, but not limited to, birds and bird or squirrel nests, fish, water fowl and reptiles. No person shall remove the young from the eggs of any such animal. No person shall feed animals in any zoo area except unconfined squirrels, sparrows, pigeons and ducks. No person shall throw anything whatever into any animal cage or enclosure, or tease, annoy, frighten, molest or injure in any manner any animal or bird whether confined or otherwise.

12. Loitering so as to Obstruct Public Ways and Places.

It shall be unlawful for any person to loiter, loaf, wander, stand or remain idle either alone and/or in consort with others or on park property in such a manner as to:

a obstruct any driveway, public sidewalk or any other place or building by hindering or impeding or tending to hinder or impede the free and uninterrupted passage of vehicles,

traffic or pedestrians; or

b. commit in or upon any driveway, public sidewalk or any other public place or building any act or thing which is an obstruction or interference to the free and uninterrupted use of property or with any business lawfully conducted by anyone in or upon or facing or fronting on any public street, public highway, public sidewalk or any other public place, or building, all of which prevents the free and uninterrupted ingress and egress.

13. Polluting and Littering.

a. Littering.

No person shall bring into, leave behind, or dump any material of any kind, whether waste or otherwise, in the park, except refuse, ashes, garbage and other material arising from the normal use and enjoyment of a picnic or other permitted activity provided such material is deposited in receptacles provided for such purposes.

b. Polluting.

No material of any kind shall be left or deposited in parks so as to pollute the land, waters or air coursing through or over the parks or otherwise to interfere with proper use and enjoyment of the park. No person shall throw, cast, deposit, damage, lay, place or scatter in the water of Lake Michigan adjacent to the Park District, or on any

waterway, harbor or lagoon of the Park District, or upon any bathing beaches of the Park District any glass, bottles, nails, cans or other sharp or cutting substances of any kind. No person shall throw, cast, lay, drop or discharge into or leave in the boating beaches or waters in any park or in any storm sewer, or drain flowing into said waters, any substance, matter or thing, liquid or solid, which may or shall result in the pollution of said waters.

14. Hindering or Soliciting Employees or Contractors.

No person shall interfere with, or in any manner hinder any Employee or Contractor of the Park District while engaged in constructing, repairing or caring for any park property; nor shall any person solicit any Employee or Contractor of the Park District while such Employee or Contractor is on duty.

15. Vehicles.

a. Snowmobiles.

No snowmobiles or similar vehicles shall be permitted upon a boulevard, driveway or upon any and all areas or premises within the Park System, unless written permission is granted by the General Superintendent.

b. Unattended Vehicles.

No motor vehicle shall be left unattended in any parking area while the motor of such vehicle is running, or when standing upon a

perceptible grade without effectively setting the brakes and turning the wheels of such motor vehicle toward the curb or the side of the parking area.

c. Exception for Emergency Vehicles and Park District Vehicles.

The provisions of this section shall not be construed to relate to emergency, police or fire department vehicles or any vehicle owned by the Park District or a Park District Employee displaying proper identification where the Employee is duly authorized to operate such vehicle at such location.

d. Noise Created by Vehicles.

It shall be unlawful to operate a vehicle which makes unusually loud or unnecessary noises.

e. Repairs to Vehicles.

No person shall change any parts, repair, wash, grease, wax, polish or clean a vehicle on any parking area within the Park District except such repairing, cleaning or polishing as is necessary to insure good vision, or such emergency repairs as are necessary to remove such vehicle from the parking area.

f. Racing Prohibited.

It shall be unlawful to race or drive in excess of the posted speed or in the absence of posting thirty miles per hour on any roadway within the Park District. It shall be unlawful to race or

drive any motor vehicle in any parking facility of the Park District at a speed in excess of that required to enter into a parking space in any such facility.

g. Illegally Parked Vehicles.

Whenever any vehicle is parked in violation of the provisions of this chapter prohibiting or restricting parking, and there is no person in attendance upon such parked vehicle to be arrested or served immediately with a notice to appear in court to answer the charge of such violation, any police Officer observing such violation may attach to the vehicle used in such violation, a notification ticket, so that the person in whose name such vehicle is registered may appear in court on a day certain, and at a designated court room to be named in such notice, and answer to the charge of such violation. It shall be unlawful for any person other than the driver of the vehicle to which said notice is attached to remove the notification ticket from said vehicle.

h. Erection of Signs Indicating when Parking is Prohibited in Parking Lots.

The General Superintendent shall erect signs indicating the hours in which parking is prohibited in parking lots in parks, and it shall be lawful for the operator of a vehicle to park any such vehicle in any such parking lot in violation of any such sign.

i. Establishment of Areas for Parking of Vehicles Equipped with Trailers Designed for Carrying Boats.

The General Superintendent may establish parking areas in which parking shall be limited to vehicles equipped with trailers designed for carrying boats, and no person shall park a vehicle in said areas unless a trailer designed for carrying boats is attached thereto.

j. Parking Fees.

The Board shall establish from time to time rates and fees for parking in any and all the parking facilities of the Park District, which fees shall be collected daily and delivered to the Treasurer within twenty-four hours thereafter.

k. Parking Meter Zones.
(1) Established.

The Board by order may establish parking meter zones in which parking shall be prohibited for a longer time than indicated in such order.

(2) Installation, Supervision of Parking Meters

The General Superintendent shall cause parking meters to be installed in such numbers and at such places in parking meter zones as established by the Board as in its judgment may be necessary to the regulation, control, and inspection of the parking of vehicles herein, and shall cause parking meter spaces to be so designated as

hereinafter provided. He/she shall have supervision of the installation, operation, maintenance, regulation and use of such meters, and the Treasurer shall have charge of the collection of coins deposited in said meters.

(3) Parking Regulated.

The operator of a vehicle shall not park such vehicle in a parking meter zone as established by order of the Board, except as hereinafter provided. The Board shall by order designate the hours of the day and the days of the year when parking in a parking meter zone is governed by the terms of said order. Each parking meter shall bear thereon a legend indicating the days and hours when the requirement to deposit coins therein shall apply.

(4) Time Limitations: Fees.

Time limitations for parking in parking meter zones shall be as established from time to time by the Board. Parking fees in parking meter zones shall be as established by the Board.

(5) Placement of Meters.

Parking meters shall be installed immediately adjacent to the individual parking places designated. Each parking meter shall be set in such manner as to display by a signal that the parking space adjacent to such meter is or is not legally In use. Each parking meter shall

indicate the value of the coins to be deposited, the legal parking time established and when operated shall indicate the duration of the period of legal parking, and on the expiration of such period, shall indicate illegal or overtime parking.

(6) Pavement Markings.

The General Superintendent shall have markings painted or placed upon the pavement adjacent to each parking meter for the purpose of designating the parking space for which said meter is to be used, and each vehicle parking adjacent to any parking meter shall park within the lines or markings so established. It shall be unlawful to park any vehicle in such position that the same shall not be entirely within the area so designated by such lines or markings.

(7) Deposit of Coins.

When any vehicle shall be parked in any parking meter zone the operator of such vehicle shall, upon entering the parking space, immediately deposit or cause to be deposited a coin of the United States in such parking meter, of the denomination indicated, and put such meter in operation. Failure to deposit such coin and put the meter in operation shall constitute a violation of this Code.

(8) Time Limits.

Upon placing such meter in operation as aforesaid, the parking space may be lawfully

occupied by such vehicle for the period of time designated on the meter for the value of the coins deposited in such meter.

(9) Use of Coins.

The coins required to be deposited hereby are levied and assessed as fees to cover the cost of supervision, inspection, installation, operation, maintenance, control and use of the meters, for the cost of supervising and regulating the parking of vehicles in the parking meter zone, for the purpose of acquiring, establishing, improving, maintaining and operating parking facilities, and for the purpose of traffic regulations.

(10) Tampering with Meter.

It shall be unlawful for any person to deface injure, tamper with, open or willfully break, destroy, or impair the usefulness of any parking meter.

(11) Using Slugs Prohibited.

(a) It shall be unlawful for any person to insert, or attempt to insert, into the coin receptacle of any parking meter, any slug, button or other substance, or to manipulate or operate in any manner whatever, any parking meter or any mechanism or device connected or commonly used therewith, with the intent to park in a parking meter zone without paying therefor.

(b) It shall be unlawful for any person to insert, or to attempt to insert. into the coin receptacle of any parking meter, any slug, button, wire, hook, or other implement or substance with the intent to obtain-from such coin receptacle a legal tender coin of the United States.

I. Parking Prohibited Except in Designated Parking Area.

The General Superintendent may, by rule, designate certain enclosed areas in which parking shall be allowed only by prepaid permit. The General Superintendent shall set the term of validity for such permit and the schedule of fees for its use. All persons having paid a fee shall receive from the General Superintendent a dashboard identification card valid for the term of the permit and a device or card which will activate the automatic entrance and exit gates at the designated parking areas. Every vehicle parked within the designated parking area must clearly display said identification card on the dashboard of the parked vehicle. Should any vehicle parked within the designated permit parking area not display the proper identification card for that particular designated area, said vehicle shall be subject to fine and towing.

16. Explosive Devices.

No person shall fire, discharge or set off any rocket, cracker, torpedo or other fireworks, or any substance of an explosive nature within the Park System.

17. Parties and Parental Responsibility.

a. The parent or legal guardian of a minor defendant who resides with such parent or legal guardian shall be jointly and severally liable for any fine or condition of restitution or reparation imposed by a court upon a minor for violation of this Code; provided that the payment may not be demanded of such parent or legal guardian unless and until the minor has not paid the fine or made restitution or reparation within the time ordered by the court; and provided that said parent or legal guardian has been served with summons or notice to appear in the original cause and all proceedings thereafter as provided by law.

b. Every person who commits, attempts to commit, conspires to commit, or aids or abets in the commission of any act declared herein to be unlawful, as a principal, agent, or accessory, shall be guilty of such offense, and every person who falsely, fraudulently, forcibly or willfully induces, causes, coerces, requires, permits or directs another to violate any provision of this Code is likewise guilty of such offense.

c. Any person who is the owner, registered owner, or person in control of any animal, vehicle or other property of any kind brought, placed, parked or allowed to remain on park property in violation of this Code or any regulations issued

pursuant to the Code, shall be deemed prima facie responsible for such violation and shall be subject to the penalties provided for herein.

18. Fines and Appeals.

a. Fines.

The violation by a person or other legal entity of this chapter shall subject such person or entity to a civil fine of up to $500. Each day that a violation continues shall be deemed a separate violation. The Park District shall give such person or entity prompt written notice of any fines. Such notice shall be served on the person or legal entity by personal delivery, or by deposit in the United States mail, with proper postage prepaid to the name and address of such person or entity.

b. Appeal Procedures.

A person or other legal entity who wishes to appeal the proposed imposition of a fine for violation of this chapter shall file such an appeal within ten days after actual receipt of the notice by filing with the General Superintendent or his/her designee a written request for hearing. If no timely appeal is filed, the General Superintendent may proceed to execute the proposed fine and such person or entity shall have no further right of appeal.

c. Hearing.

Upon receipt of a timely request for hearing, the

hearing will be scheduled by the Deputy General Superintendent of Parks and Recreation within thirty days after receipt by the Deputy of the written request for hearing. The appellant will be notified in writing of the time and place of the hearing. The hearing will be conducted by an impartial non-Employee hearing Officer appointed by the General Superintendent or his/her designee. The Park District shall have the burden of proving by a preponderance of the evidence any charge of violation of this chapter. At the hearing, the appellant shall have the right to counsel, to call witnesses and present evidence in his/her behalf, to see all evidence against him/her and to cross-examine opposing witnesses. The hearing Officer shall not be bound by the technical rules of evidence but may admit such evidence as is commonly relied upon by reasonably prudent persons in the conduct of their affairs. Within thirty days after completion of the hearing, the hearing Officer shall submit a written recommendation to the General Superintendent sustaining, modifying, or reversing the proposed action of the Deputy . Within ten days after their receipt of the hearing Officer's recommended decision, the Deputy and/or the appellant may file with the General Superintendent written exceptions to the recommended decision. With ten days after the last date for filing exceptions to the recommended decision, the General Superintendent shall render a final decision in the name of the Park District accepting, modifying or reversing the recommended decision of the hearing Officer. The Deputy shall then promptly execute the decision of the General Superintendent.

19. Severability.

If any provision of this ordinance or the application thereof to any person or circumstance be held invalid, the remainder of this ordinance and the application of such provision to other persons or circumstances shall not be affected thereby. The Park District reserves the right to amend or repeal this ordinance at any time; and an rights, privileges and immunities conferred by this ordinance or by acts done pursuant hereto shall exist subject to such power.

SECTION C. - PERMITS.

1. Designation of Park Facilities.

a. Proposed Designation.

The General Superintendent shall classify all park property under a uniform system of classification and designate for each such classification the use or uses which, in his/her judgment, should be permitted therein. Categories of classifications which the General Superintendent shall designate may include, but are not limited to, parks, playgrounds, playlots, fieldhouses, boat harbors, and leased facilities. The General Superintendent shall classify all park property under the following classification system:

(1) public forums;
(2) limited use areas;
(3) areas or facilities not designated for public assembly; or
(4) special facilities.

The General Superintendent shall then record the designations for each park and shall transmit the same promptly to the Board, which shall then approve, amend or reject the designations. Thereafter, the General Superintendent may, from time to time, as he/she shall deem necessary and proper, amend or revise his/her designations and shall promptly transmit in writing the amendments or revisions to the Board, which shall approve, amend or reject the same. All such designations, and the General Superintendent's amendments and revisions thereof, shall be in full force and effect

from the time that the same are expressly approved as such or as amended by the Board.

b. Public Review of Proposed Designation.

Simultaneous with the transmission to the Board of the plats or maps required by this ordinance, or of any written amendments or revisions thereof, the General Superintendent shall file a duplicate copy of the same with the Secretary, which duplicate copy shall be available for public inspection and copying in the Office of the Secretary during normal business hours.

2. Rules and Regulations.

The General Superintendent may, from time to time, establish reasonable rules and regulations, for the use of each facility in the Park System and for obtaining permits pursuant to this chapter. Such rules and regulations shall be based on a due regard for the purpose for which the facility is established, the safety of those using the facility, of park Employees and of the public, the safety and maintenance of Park District property, the need for and the availability of supervisory personnel, and the maximum number of people who can safely use the facility at one time. Subject to the foregoing, and except as hereinafter provided, all Park District facilities may be used by members of the general public, without permit, for recreational and athletic purposes not inconsistent with the nature of the facility and the safety of the public and of Park District property.

3. Permit Requirement.

a. General.

No person shall, without a permit:

(1) conduct a public assembly, parade, picnic, or other event involving more than fifty individuals;

(2) circulate or distribute any leaflets, handbills, notices, pamphlets, books, documents or papers of any kind in any indoor facility, fieldhouse, garden, zoological garden or other special facility;

(3) conduct any exhibit, music or dramatic performance, fair, circus, concert, play, radio or television broadcast, other than a news transmission;

(4) exhibit or display any motion picture, television program, light or laser light display, or similar event;

(5) operate a vehicle, except upon a publicly dedicated street, alley, watercourse or other thoroughfare which may abut or traverse a park;

(6) create or emit any Amplified Sound, except from a radio, recorder or other device possessed and used by an individual for his/her own enjoyment and operated in such a manner so as not to interfere with the use and enjoyment by an other person;

(7) station or erect any building, tent, canopy, stand, bandstand, stage, tower, scaffold, sound stage, platform, rostrum or other structure;

(8) station or use any electrical or electronic device or equipment that would require outdoor auxiliary power;

(9) sell or offer for sale any goods or services;

(10) display, post or distribute any placard, handbill, pamphlet, circular, book or other writing containing commercial advertising matter within the Park System;

(11) bring, land or cause to ascend or descend or alight within the Park District, any airplane, helicopter, flying machine, balloon, parachute or other apparatus for aviation;

(12) conduct any sporting event;

(13) ride any Horse on any driveway, roadway, path or trail; or

(14) bring onto property a tame, non-domestic supervised and controlled or restrained animal for limited non-commercial or promotional purposes.

(b) Permits for Activities Involving More Than 500 Individuals.

No activity involving more than five

hundred individuals shall be held within two thousand five hundred feet nor within two hours of any other activity involving more than five hundred individuals.

(4) Application for Permits.

a. Filing Written Application.

(1) Special Event Permit

Any person seeking the issuance of a permit shall apply for a permit by filing a written application for permit on a form and within such time as shall be prescribed by the General Superintendent Applications involving any of the following activities shall be filed with the Region Manager for the region in which the special event is to take place, or his/her designee:

a. an event involving more than fifty individuals;

b. the sale or offering for sale of any good or service;

c. the sale or service of alcohol on Park District property;

d. advertising or commercial activities;

e. activities involving more than one park;

f. a religious or partisan political event;

g. creation or emission of any Amplified Sound, except from a radio, recorder or other device possessed and used by an individual for his/her own enjoyment and operated in such a manner so as not to interfere with the use and enjoyment by another person;

h. stationing or erecting any building, stand bandstand, stage, tower, tent, canopy, scaffold, sound stage, platform, rostrum or other structure;

(i) use of any electrical or electronic device or equipment requiring outdoor auxiliary power;

(j) bring, land or cause to ascend or descend or alight within the Park District, any airplane, helicopter, flying machine, balloon, parachute or other apparatus for aviation;

(k) riding of a Horse or Horses; or

(l) use of mechanical rides (which may be permitted only on hard surfaces).

2. Media/Motion Picture/Commercial Photography

Any person seeking the issuance of a permit for filming of a media broadcast (other than a news transmission), motion picture, or still commercial photography shall file a written application for permit with the General Superintendent or his/her designee on a form and within such time as shall be prescribed by the General Superintendent.

3. Recreational Permits

Any person seeking to reserve Park District facilities for any event involving less than fifty people and not including the items covered in paragraph 4(a)(1), above, shall file a written application with the park/playground supervisor where the event is proposed to take place on a form and within such time as shall be prescribed by the General Superintendent.

4. Special Facilities

Any person seeking the issuance of a permit for use of Park District property designated as a special facility shall file a written application for permit with the General Superintendent or his/her designee on a form and within such time as shall be prescribed by the General Superintendent.

b. Application Fee.

For any activity described in this chapter, Section C.4.a, no application for permit shall be considered unless the applicant shall have paid at the time for filing an application for permit the required application fee in an amount in accordance with the schedule of fees set by the General Superintendent and approved by the Board.

j. Indemnification and Reimbursement Agreement.

No application for permit shall be granted unless the applicant shall have executed an agreement with the Park District, on a form to be prescribed by the General Superintendent, in which the applicant shall promise and covenant to bear all costs of policing, cleaning up and restoring the park upon conclusion of the event or activity; to reimburse the Park District for any such costs incurred by the Park District; and to indemnify the Park District and hold the Park District harmless from any liability to any person resulting from any damage or injury occurring in connection with the permitted event proximately caused by the action of the permittee, the sponsoring organization, its Officers, Employees or agents or any person under their control insofar as permitted by law.

d. Security Deposit.

For any activity described in this chapter,

Section C.4.a(1) , Section C.4.(a)(2) or Section C.4.(a)(4), no application for permit shall be granted unless the applicant has paid, within the time prescribed by the General Superintendent, the security deposit in an amount in accordance with the schedule of fees set by the General Superintendent and approved by the Board. The amount of the security deposit set in the schedule of fees shall be equal to the estimated cost of policing, cleaning up, and restoring the park upon the conclusion of the use or activity. The security deposit shall be deposited by the Park District into an escrow account. Promptly after the conclusion of a permit activity, the Park District shall inspect the premises and equipment used by the permittee.

(1) If it is determined that there has been no damage to Park District Property or equipment beyond reasonable wear and tear, the security deposit shall be refunded in full within thirty (30) days of the conclusion of the permitted event.

(2) If it is determined by such inspection, that the permitted event proximately caused damage to Park District property in excess of normal wear and tear and which requires repairs in excess of routine maintenance or it is determined that fines should be assessed against the permittee pursuant to

this chapter, Section C. 7., below, the Park District shall retain the security deposit or any portion, thereof, necessary to pay for the cost repair or any fines assessed against the permittee. The General Superintendent or his/her designee shall given written notice of the assessment of damages or fine and retention of the security deposit to the permittee by personal delivery or by deposit in the United States mail, with proper postage prepaid to the name and address set forth in the application for permit. Any assessment of damages or fine in excess of the security deposit shall be paid to the Park District within ten (10) days after notice of such assessment of damages or fine is sent. Retention of all or a portion of a security deposit shall be subject to the appeal procedures contained in Section C.6., below. An assessment of damages or fine in excess of the security deposit shall be subject to the appeal procedures contained in Section B.18(b) and (c)., above.

e. Fees for Use of Park Facilities.

No application for permit shall be granted unless the applicant has paid, within the time prescribed by the General Superintendent, a user fee and any other required fee in an amount in accordance

with the schedule of fees set by the General Superintendent and approved by the Board. No application for permit shall be granted unless all required fees are paid as specified in paragraph 5(b), below.

f. Insurance.

Applicant shall procure and maintain at all times during its use of Park District property, insurance in such amounts and with such coverages as shall reasonably be required by the Park District and shall name Park District as an additional insured thereunder. The amounts and type of insurance required shall be determined by the Division of Risk Management. based upon the nature of the activity and the risk involved. The Division of Risk Management shall prepare a uniform schedule of insurance guidelines for particular types of activities. Applicant shall provide Park District with a certificate from an insurer evidencing such coverage prior to applicant's use of Park District property, and within the time prescribed by the General Superintendent. The certificate shall also provide that the insurer shall give the Park District reasonable advance notice of insurer's intent to cancel the insurance coverage provided.

g. Permits Not Transferable.

No permit or conditionally approved permit application may be transferred.

5. Processing of Application for Permits.

a. Order.

Applications for permits shall be processed in order of receipt; and the use of a particular park or part thereof shall be allocated in order of receipt of fully executed applications accompanied by the application fee.

b. Conditional Approval.

Applications for permits for activities or events which require insurance, approval or permits from other governmental entities, or compliance with other terms or conditions, will be reviewed and, if the application otherwise conforms to all other requirements, a conditional approval will be issued. If within the time prescribed by the General Superintendent, any required fee or security deposit is not paid, or an insurance certificate evidencing the requisite insurance is not filed with the Division of Risk Management, or the approval or permit of other governmental entities has not been received, or the other terms and conditions have not been met, the conditional approval will automatically expire, the application for permit will be deemed denied and no written notice of denial will be required. For events or activities which involve the use of special facilities, or activities described in this chapter, Section C.4.a. (1)(b),(c), (d), (g), (h), (i) or (j), above, all terms and conditions for issuance of the permit, including securing insurance and payment of all fees and security deposit, must be completed at least thirty days prior to the event unless a longer time period is

prescribed by the General Superintendent.

No permit shall be issued unless all applicable fees and security deposit are paid within the times prescribed by the General Superintendent. Failure to pay fees or security deposit within that time shall cause the application to be deemed denied, without further notice to the applicant.

b. Written Denials.

If no written denial or conditional approval is issued within fourteen days of the date on which a permit application is fully completed, executed and filed with the appropriate Officer or Employee, as designated by the General Superintendent, the application shall be deemed to have been granted a conditional approval pursuant to Section 6.b., above. Provided, however, the Park District may extend the period of review for an additional fourteen days by issuance of a written notice of extension. If, prior to the expiration of the extended review period, no written denial is issued, the application for permit shall be deemed to have been granted a conditional approval pursuant to Section 6.b., above.

c. Notice of Extended Review or Denial or Issuance of Permit.

Written notice of denial or notice of extension shall be served on the applicant by personal delivery, or by deposit in United States mail, with proper postage prepaid, to the name and address set forth on the application for permit.

d. Contents of Notice; Grounds for Denial.

Notice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit. Where an application or permit has been denied because a fully executed prior application for the same time and place has been received, and a permit has been or will be granted to the prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area, the Park District shall propose an alternative place, if available for the same time, or an alternative time, if available for the same place.

To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:

(1) the application for permit (including any required attachments and submissions) is not fully completed and executed;

(2) the applicant has not tendered the required application fee with the

application or has not tendered the required user fee, indemnification agreement, insurance certificate. or security deposit within the times prescribed by the General Superintendent;

(3) the application for permit contains a material falsehood or misrepresentation;

(4) the applicant is legally incompetent to contract or to sue and be sued;

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part hereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;

(8) the proposed use or activity is prohibited by or inconsistent with the classifications

and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

(10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;

(11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent; or

f. Amendment or Revision of Applications. Any amendment or revision of an application or permit shall for purposes of determining the priority of the application for permit, relate back to the original filing thereof; but the time in which the Park District shall grant or deny the application for permit and serve notice of such granting or denial shall be computed from the date of the amendment or revision.

6. <u>Procedures for Review: Waivers.</u>

a. Review by General Superintendent.

(1) Any applicant who is denied a permit or

denied a request for a waiver of user fee, security deposit, or certificate of insurance, or a permittee who has had all or a portion of its security deposit retained because it was assessed damages or a fine, pursuant to this ordinance may, within seven days of the service of notice of such determination, file a written appeal from such determination with the General Superintendent;

(2) The General Superintendent shall have seven days from the date on which the appeal was received in which to serve upon the applicant a notice that he/she has affirmed, modified or reversed the denial or retention of security deposit;

(3) Such notice shall be deemed served upon the applicant or permittee when it is personally delivered or when it is sent by United States mail, with proper postage prepaid, to the name and address set forth on the application for permit;

(4) such notice is not served upon the applicant or permittee within seven (7) days of the date upon which the appeal was filed, then the denial or retention of security deposit shall be deemed reversed.

b. Form of Appeals.

Any appeals filed pursuant to this ordinance shall state succinctly the grounds upon which it is asserted that the determination should be modified or reversed and shall be accompanied

by copies of the application for permit, the written notice of the determination of the Park District, and any other papers material to the determination.

c. Waiver of Requirements.

Any requirement for a user fee, security deposit, or certificate of insurance shall be waived by the General Counsel, if the activity is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity. Fees for equipment and services shall not be waived pursuant to this subsection. Application for a waiver of a user fee, security deposit, or certificate of insurance shall be made on a form prescribed by the General Counsel and must include an affidavit by the applicant and sufficient financial information about the applicant to enable the General Counsel to determine whether the requirement(s) would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity. If it appears that the applicant does not have sufficient funds to satisfy the user fee requirement prior to the proposed event, but that the applicant intends to raise sufficient funds at the event, the General Counsel shall require the applicant to pay such user fee out of the proceeds of the proposed event. If no written denial is issued within fourteen days of the date on which the application for such waiver is fully completed, executed and filed with the General Counsel, the waiver request shall be deemed approved,

contingent upon the applicant complying with all other permit requirements. Denials of requests for such waivers shall be subject to the appeal procedures contained in Section 6.a, above.

7. Fines.

The violation by a permittee of the terms of his/her permit or the laws and regulations of the Park District shall subject the permittee to a civil fine of up to $500. Each day that a violation continues shall be deemed a separate violation. Such fines may be assessed against any security deposit held by the Park District on behalf of the permittee, pursuant to this chapter, Section C.4.d., above. Any assessment of fines in excess of any security deposit shall be subject to the procedures contained in Section B.18. above.

8. Severability.

If any provision of this ordinance or the application thereof to any person or circumstance be held invalid, the remainder of this ordinance and the application of such provision to other persons or circumstances shall not be affected thereby. The Park District reserves the power to amend or repeal this ordinance at any time; and all rights, privileges and immunities conferred by this chapter or by acts done pursuant hereto shall exist subject to such power.

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Supreme Court, U.S.
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No. 00-1249

In the

Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

I. Is a content-neutral ordinance that requires a permit for core political speech in a traditional public forum analyzed as a prior restraint or under the more deferential standard applicable to time, place and manner regulations?

II. May a plaintiff bring a facial challenge to a permit ordinance which restricts political speech in a public forum without first having to prove that the ordinance has been unconstitutionally applied to him because of the government's hostility to the plaintiff or his proposed speech?

III. Must an ordinance requiring a permit for core political speech in a traditional public forum include each of the procedural safeguards established in *Freedman v. Maryland*, or is that case only applicable to sexually explicit speech presented by adult entertainment businesses?

IV. Does immediate access to the courts following a denial of a permit for core political speech in a traditional public forum constitute prompt judicial review, as required by *Freedman v. Maryland*, when there is no requirement for a prompt judicial decision?

V. Can an ordinance requiring a permit for core political speech in a traditional public forum include unfettered discretion to issue or withhold permits?

PARTIES TO THE ACTION BELOW

The original plaintiff in this case was Robert MacDonald, who died while the case was pending in the United States Court of Appeals for the Seventh Circuit. Caren Cronk Thomas and Windy City Hemp Development Board, Inc. were allowed to substitute as appellants in the Circuit Court. The Chicago Park District was the only defendant and appellee below.

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OPINIONS BELOW

The unpublished opinion of the United States District Court for the Northern District of Illinois, entered on March 29, 1999, is reproduced in the Appendix to the Petition for Writ of Certiorari (Pet. 75a). The opinion of the United States Court of Appeals for the Seventh Circuit is also reproduced in the Appendix to the Petition (Pet. 1a).

JURISDICTION

The Petition was taken to review a decision of a United States Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATUTES AND ORDINANCES

The pertinent provisions of the Chicago Park District Ordinance, both in the form it existed when this suit was filed and as subsequently amended, are reproduced in the Joint Appendix (J.A. 59, 103).

STATEMENT OF THE CASE

Introduction

This is a facial challenge to an ordinance requiring all persons who would engage in core political speech in the public parks of the City of Chicago to obtain a permit before uttering a word. The General Superintendent of the Chicago Park District has been granted the authority to issue or deny permits for group activities in the parks–including political rallies–in his unfettered discretion. The ordinance is a prior restraint on activities that this Court has described as "the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), and should contain each of the procedural safeguards mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965). Three of those safeguards–prompt judicial review of a permit denial, the burden of the government to initiate that review and then prove why the permit should not be granted–are not included within the ordinance.

The Seventh Circuit rejected this Court's binding precedent when it upheld the ordinance against all constitutional challenges. Because the General Superintendent has unlimited discretion to deny permits for political reasons, and the lack of *Freedman*'s procedural safeguards, the ordinance is unconstitutional under the First Amendment.

Facts

The Speaker: Robert MacDonald and the Ad Hoc Coalition for Drug Law Reform

Petitioners' predecessor, Robert MacDonald, was a grass-roots political activist involved in campaigns for drug policy reform.[1] He organized and led marches through city streets and held rallies in the parks, advocating his positions on these issues of great public interest. In 1997 he was denied a permit to conduct a march through the streets of Chicago on behalf of the Ad Hoc Coalition For Drug Law Reform.[2] The march was to culminate in a political rally in Grant Park. He was denied a permit for the rally as well. These denials were the first in a long series of difficulties MacDonald and his associates have had in obtaining government permission to engage in core political speech in traditional public fora in Chicago.

The Chicago Park District and its Code

The Chicago Park District ("Park District"), a body politic under Illinois law, has enacted the Park District Code ("Code").[3] The Code regulates all activities in the City's parks, including political rallies involving core political speech. The Code requires, among many other things, that anyone wishing

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1. In this brief the Appendices to the Petition for Writ of Certiorari are cited as "Pet. ___." The Joint Appendix is cited as "J.A. ___."

2. MacDonald's Petition for Writ of Certiorari in the related challenge to Chicago's parade permit ordinance has been filed. *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001), *pet. for cert. pending* (Docket No. 00-1839).

3. The Park District has authorized its General Superintendent to enact "reasonable rules and regulations" to flesh out the Code's provisions, but apparently he has not done so (Code § C.2.; J.A. 62).

to speak in any city park with a group involving more than fifty individuals, or with a group of *any* size utilizing amplified sound, must first seek the Park District's permission by filing a written application for a permit (Code § C.3.a. (1), (6); C.4.a.; J.A. 63-65).[4] The applicant must pay an application fee, security deposit and user fee, execute an indemnification and reimbursement agreement, and obtain insurance coverage (Code § C.4.b.-f.; J.A. 64-69).[5] The Code provides that the Park District "may" waive "[a]ny requirements for use fees, deposits, proof of insurance or premium for insurance" if its General Counsel decides that the proposed "activity is protected by the First Amendment and the fees would be so financially burdensome as to preclude the applicant from using Park District Property for the proposed activity." (Code § C.6.c.; J.A. 75).

The Park District must send a written response to each application within fourteen days, but can unilaterally extend this review period for another fourteen days, apparently for

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4. The City of Chicago is not bound by the Code, but has an agreement with the Park District covering various events, including the Taste of Chicago, the Chicago Blues Fest, the Chicago Gospel Fest, and the then-Champion Chicago Bulls' celebration. (Transcript of Proceedings held before Magistrate Judge Keys on July 21, 1997, filed as item 61 in the district court on September 8, 1997, at 68-70, 94) (hereinafter "7/21/Tr. at ____.") The Park District also exempts itself from its Code requirements, and gets first pick on the dates it wants for its events, such as concerts by the Grant Park Symphony. *Id.* at 70-71.

5. The fees can be staggering for anyone without a great deal of money, especially when the event will not generate funds. One can expect to be charged many thousands of dollars each day under the Code's requirements.

any reason (Code § C.5.c.; J.A. 70).[6] The Park District "may" deny a permit application based upon any one or more of thirteen enumerated grounds, including:

> (2) the application for permit is not fully completed and executed; . . .
>
> (3) the application for permit contains a material falsehood or misrepresentation;
>
> (4) the applicant is legally incompetent to contract or to sue or be sued;
>
> (5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District; . . .
>
> (7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place; . . .
>
> (9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public; . . .
>
> (12) the applicant has not secured the requisite insurance; or
>
> (13) the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or

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6. An applicant may not receive notice of a permit denial until the very day of the planned event. (7/21/97 Tr. at 64).

has violated the terms of prior permits issued to the applicant.

(Code §C.5.e.; J.A. 71-73).

Under Subsection (13) the Park District can deny an application if it decides that the applicant has violated the terms of a prior permit–without a hearing and without even disclosing what "evidence" it considered. The Park District can also subject a permittee to civil fines of up to $500 for each day a permit violation continues. (Code § C.7.; J.A. 75).

If an application is denied, the applicant can file a "written appeal" to the General Superintendent within seven days (Code § C.6.a. (1); J.A. 74). The Code does not provide for a hearing where the applicant can present testimony or respond to any purported reasons for denial of a permit at any stage of the process. (Code § C.6.; J.A. 73-74).[7] The General Superintendent has seven days from receipt of the appeal to notify the applicant whether the denial is affirmed, modified or reversed. (Code § C.6.a. (2); J.A. 74).

The Park District Denies MacDonald and His Coalition Permission to Speak

On March 5, 1997, MacDonald filed a permit application on behalf of the Ad Hoc Coalition for Drug Law Reform, seeking to hold a rally in Grant Park on May 10 and 11, 1997. (J.A. 77-78). He simultaneously filed the Park District's form "Affidavit in Support of First Amendment Claim for Waiver of Park District Insurance Requirement or Fee," verifying that the planned rally was to be "based on the theme of [d]rug [p]olicy [r]eform" and was protected by the First

7. *See also* the Transcript of Proceedings held before Magistrate Judge Keys on May 6, 1997, filed as item 61 in the district court on September 8, 1997, at 38-39, 76 (hereinafter "5/6/97 Tr. at _.").

Amendment. (J.A. 79-80). MacDonald also swore that the Coalition had "no money," and that the insurance and user fee requirements were so financially burdensome that they would preclude the Coalition from conducting the rally. (J.A. 79-80).

By letter dated March 12, 1997, Park District General Counsel Joan Fencik advised MacDonald that his application had been denied, for three reasons. (J.A. 81-83).[8] First, she claimed that MacDonald had violated, "in multiple respects," the terms of permits for events held in 1996, and had "misrepresented the nature and scope of [his] intended activities" in connection with those prior events. (J.A. 81). Second, she said that the current application was "incomplete or incorrect" in that he had stated in the application that the Coalition was a not-for-profit organization, but he did not "attach a current verification of section 501(c)(3) status." (J.A. 81-82). Finally, she said the Coalition was not legally competent to contract and was not a proper applicant. (J.A. 82). Fencik testified that had she granted his permit application, she would have rejected his First Amendment claim for waiver of the insurance requirement and other fees "based on last year's experience," claiming that she "would need a more detailed explanation of the purpose of the rally and what First Amendment rights are impacted."(J.A. 82).[9]

On March 18, 1997, MacDonald filed his letter-appeal with the General Superintendent, specifically refuting each of

8. Fencik testified that she does not "normally get involved in every permit application" filed with the Park District. (5/6/97 Tr. at 101). But she took a particularly hands-on approach with MacDonald's permit applications. (7/21/97 Tr. at 13, 66; Def. Ex. 6).

9. Fencik, who said she determines whether the various fees are sufficiently burdensome for an applicant to justify a waiver, could not articulate any standards governing her decision; she sets her own criteria. (5/6/97 Tr. at 90-93).

the three grounds given for denial of his application. (J.A. 84-88). He also filed an amended application in his own name to cure Fencik's allegation that the Coalition was not legally competent to contract. (J.A. 87).

On March 24, 1997, the General Superintendent advised MacDonald that his appeal was denied. (J.A. 89-95). He not only affirmed Fencik's conclusions, but claimed "further investigation" had disclosed a panoply of other alleged violations of the 1996 permits, including individuals consuming alcohol and remaining in the park after hours. (J.A. 91).[10] He concluded that the alleged violations of the 1996 permit disqualified MacDonald from receiving a permit, regardless of "whether the applicant is your ad hoc committee [sic], you individually, or any other applicant who submits an application on your behalf." (J.A. 94). Furthermore, that ban was indefinite in duration: "Until the previous violations and misrepresentations are fully addressed and resolved, the Park District will deny you a permit." (J.A. 94).[11]

MacDonald's request for a First Amendment waiver of the insurance requirement and various fees was also rejected, again based upon the alleged 1996 permit violations. The

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10. Fencik testified that the permit holder is strictly liable for any violations of a permit by anyone, regardless of any ability to control such conduct, and that the Code allows the denial of an application even where others totally unrelated to that holder violated conditions attached to a previous permit. (5/6/97 Tr. at 93-97).

11. No Park District official or employee has ever explained how these alleged violations are to be "fully addressed and resolved." The Park District withheld MacDonald's security deposit in 1996, but never assessed any fines against him – the only way to "address and resolve" those issues under the Code (Code § C.7.; J.A. at 75). The Code makes no provision for any hearing to address and resolve allegations, either when they are made or at a later date. (5/6/97 Tr. at 38-39, 76).

General Superintendent advised MacDonald that even if his permit were granted, the Park District would require a user fee of $8,000 for each day of his event, payable no later than 30 days in advance, a security deposit of $2,500, and a certificate of insurance for $1,000,000. (J.A. 94-95). He concluded by re-emphasizing the lifetime ban that prohibited MacDonald from speaking in the Chicago parks: "the permit applications state unequivocally that 'violation of the terms of this permit shall be grounds for denial of all future permit applications.' The Park District Code contains this same provision." (J.A. 95).[12]

MacDonald quickly filed an amended appeal, stating that "I was not present in [the park] for the violations [during 1996] which Ms. Fencik alleges, . . . [a]ll of my activities in [the park] ended well before the park closed, and I did not encourage anyone to stay in the park after that time." (J.A. 99). On March 26, 1997 the General Superintendent summarily denied the appeal stating, "you were the permittee on the [1996] permit, and were responsible for ensuring that all requirements of the permit were met. Your failure to be on site to supervise your own event does not excuse the permit violations." (J.A. 102).

The Administrative Record

In his March 24, 1997 letter to MacDonald rejecting his appeal, the General Superintendent stated that he had considered the following: MacDonald's permit application; Fencik's letter denying his application; MacDonald's written appeal, including attachments; MacDonald's "prior applications;" unspecified "other documents relating to the

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12. Fencik confirmed that the Code allows the Park District to ban speech based on alleged violations of previous permits. (5/6/97 Tr. at 93).

prior events;" and "I have also spoken with Joan Fencik about the circumstances surrounding your application and the prior events." (J.A. 89-90). MacDonald was not privy to those conversations, which were not memorialized in any way or otherwise made part of any record.

MacDonald Seeks a Lawyer and Relief From the Courts

Upon receiving the rejection of his amended appeal, MacDonald immediately sought legal counsel, speaking to three or four lawyers, none of whom would agree to take his case *pro bono*. (5/6/97 Tr. at 35, 36). After a month of searching, less than two weeks before his planned event, he was finally able to obtain counsel. *Id.* at 36-37, 45. Rather than seeking the more cumbersome common law *certiorari* review remedy in the Illinois state courts, MacDonald filed this action in the district court on April 29, 1997, bringing a facial attack against the Code. (J.A. 47). He immediately sought preliminary injunctive relief. That motion was denied because the court concluded that there was insufficient time to conduct orderly proceedings prior to the scheduled date for MacDonald's event.[13]

MacDonald then filed a second application for a preliminary injunction, for a rally to be held in August, 1997. This time, after a full evidentiary hearing, Magistrate Judge Keys granted the preliminary injunction. MacDonald held his rally.[14]

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13. Given the pending litigation MacDonald was allowed to hold a severely curtailed rally without a permit, but was not allowed to use stages or sound amplification equipment except for a hand-held bullhorn.

14. The Seventh Circuit later vacated the preliminary injunction. (continued...)

In April, 1998 the magistrate judge recommended that the parties' cross motions for summary judgment on MacDonald's facial challenge be denied because the record was insufficiently developed as to whether the Park District had a well-established historical practice of constitutional construction and application of its Code. (Pet. 14a). On March 8, 1999, after the parties engaged in discovery on that issue,[15] the magistrate judge issued an amended Report and Recommendation, recommending that MacDonald's motion for summary judgment on the facial attack be granted in part, and that the Park District's motion be denied. (Pet. 55a). On March 29, 1999, the District Court rejected the Report and Recommendation, denied MacDonald's motion for summary judgment, granted the Park District's motion, and entered judgment in favor of the Park District. (Pet. 75a). The Seventh Circuit affirmed, 227 F.3d 921 (Pet. 1a), and this Court granted *certiorari*.

SUMMARY OF THE ARGUMENT

The Court of Appeal's opinion included holdings so in conflict with this Court's many pronouncements on the value of core political speech and the protection it must be accorded that it cannot be allowed to stand. First Amendment jurisprudence has been turned on its ear in the Seventh Circuit. Unless that decision is reversed, political speakers whose message may be at odds with the current bureaucratic "party line" will face so many obstacles that many will be silenced. Core political speech, "the lifeblood of a self-governing

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14. (...continued)
MacDonald v. Chicago Park District, 132 F.3d 355 (7th Cir. 1997).

15. The Park District refused to cooperate in this discovery, which resulted in a finding by the district court that there was no saving historical practice of the Park District. (Pet. 62a-63a, 86a).

people,"[16] will be facing its greatest threats since the dark days of McCarthyism and its "ideological cleansing."

The first glaring error of the Court of Appeals was in its holding that an ordinance requiring a permit to engage in political speech in a public park is not a prior restraint, so long as it is content-neutral. That is an obviously incorrect statement of law, as this Court has repeatedly used prior restraint analysis in reviewing content-neutral licensing schemes. The panel rationalized its position by suggesting that political speech faces no threat of censorship, unlike cases involving adult entertainment, which the panel said was more needful of First Amendment protection than political speech.

The panel's position, of course, is ludicrous. No court in America has *ever* held that core political speech is less likely to be censored, and less in need of protection, than topless dancing and sexually explicit videos. Other than the Seventh Circuit, no court is likely to do so.

Next, the panel decreed that facial challenges should not be entertained in First Amendment cases without proof that the law has been applied in an unconstitutional manner. Again, this position is so contrary to this Court's many pronouncements that it must be rejected out of hand.

Once this Court determines that the Chicago Park District ordinance is a prior restraint and is subject to a facial challenge, the Court must then answer three questions: (1) must the ordinance provide all three procedural safeguards mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965); (2) what is meant by "prompt judicial review;" and (3) does the ordinance contain unfettered discretion.

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16. *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 2001 WL 703912 (June 25, 2001) (Thomas, J., dissenting).

Freedman requires that a permit ordinance include a guarantee of prompt judicial review if a permit is denied, and a requirement that the government initiate that review. The Park District ordinance contains neither, but the Court of Appeals found that satisfactory because (a) a time, place and manner restriction (which the panel found the ordinance to be) need not include *Freedman*'s protections; and (b) Illinois' system of review through common-law certiorari is sufficient to protect any constitutional rights which may be abridged.

The panel was wrong in both regards. As this Court found the Dallas ordinance to be a prior restraint in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), so it must find this ordinance to be a prior restraint. All of *Freedman*'s procedural safeguards must apply to any restriction upon the use of public fora for their historically recognized purpose of discourse and communication. And a system where the unsuccessful permit applicant must seek judicial review and bear the burden of proving a wrongful denial, confined to a record that includes almost nothing of use to a reviewing court, faced with a presumption of correctness, and forced to wait indefinitely with no time constraints whatsoever, does not begin to meet First Amendment requirements.

There is one further assault upon free speech which must be corrected. The Seventh Circuit recognized that the ordinance contained enough discretion to present the danger of censorship, allowing the Park District to grant permits to its friends and deny them to its enemies. But the panel said this was permissible, because at least *popular* speech would not be suppressed, only *unpopular* speech.

This last position may be the most untenable of all. When a "little" discretion, used against unpopular speakers, is allowed by the courts of America, the Congress and the several states might as well amend the Constitution and remove the

Free Speech Clause. Speech will be free only for the majority.

ARGUMENT

The political movement challenging the government's policy of criminalizing and incarcerating those who use "illegal" drugs – especially marijuana – rather than concentrating on treatment, rehabilitation and education, grows stronger daily. Political activists demonstrating in the streets and parks of our cities, holding political rallies to galvanize support for their message that the war on drugs has failed and must end, are a strong component of that movement.[17] In many cities they are confronted by a government strongly opposed to their message.[18] By denying permits for the use of the streets and parks, governmental units have been able to mute this message.[19]

Since 1997, Chicago officials have repeatedly refused to grant permits for events designed to deliver this message. Petitioners and others have had to fight for the right to engage in core political speech virtually every time they attempted to hold a demonstration or parade.

The Chicago Park District has used its permit ordinance

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17. Because the federal government spends almost eighteen billion dollars *a year*, and the states another eighteen billion dollars annually, powerful special interests – like the Drug Enforcement Administration – have defended the failed government policies vigorously.

18. For example, Mayor Guiliani's administration in New York City has made it very difficult for *any* political message with which he disagrees to gain access to a public forum. *MacDonald v. Safir*, 206 F.3d 183, 191 n.4 (2nd Cir. 2000).

19. One need only compare the rallies in Boston – where permits are easy to obtain and 40,000 - 50,000 people turn out – to rallies in New York and Chicago – where permits are nearly impossible to get and the size of rallies has dwindled to a few thousand.

to make it as difficult as possible for activists to deliver their message to the public. We ask this Court to reiterate to the Chicago Park District and every government which would suppress public political speech on any subject, that ordinances like the Park District's Code are unconstitutional prior restraints which will not be tolerated. Only if this Court makes a ringing pronouncement that the First Amendment has lost none of its vitality will Petitioners and others – in Chicago, New York and every city and county in America – be able to actually exercise the cherished right of free speech, a right that we have consistently "marched our sons and daughters off to war to preserve." *Young v. American Mini Theatres, Inc., 427* U.S. 50, 70 (1976) (plurality opinion).

I. A PERMIT REQUIREMENT IMPOSED ON CORE POLITICAL SPEECH IN A PUBLIC FORUM MUST BE ANALYZED AS A PRIOR RESTRAINT.

While everyone is aware of the serious conflict among the circuits on the issue of prompt judicial review, there is a more basic question which must be answered first: is a content-neutral permit ordinance restricting political speech in a public forum a prior restraint?

A. Core political speech enjoys heightened protection under the First Amendment.

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *McIntyre v Ohio Elections Commission*, 514 U.S. 334, 346 (1995). A major purpose of the First Amendment was to protect political discussion of such issues. *Id.* This reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Political rallies and parades are "core political speech," entitled to the highest degree of protection the First Amendment affords. They are "the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), occupying the "highest rung of the hierarchy of First Amendment values," entitling it to special protection. *Connick v. Myers*, 461 U.S. 138, 145 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980). As Justice Thomas stated in dissent in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 410-11 (2000), "Political speech is the primary object of First Amendment protection." It is "the lifeblood of a self-governing people." *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 2001 WL 703912 (June 25, 2001) (Thomas, J., dissenting).

While on the one hand stating that there is no censorship of political speech in Chicago, the Seventh Circuit acknowledged that "the advocates of legalizing the sale of marijuana . . . have very few political friends." (Pet. 4a). Unpopular messages are always susceptible to governmental suppression, and require a more vigilant federal judiciary to protect them. "[E]xpression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 411 (1989).

Petitioners' activities deserve much more than the short shrift afforded them by the Seventh Circuit. They deserve the strongest protection the First Amendment provides, particularly in the forum in which they were to take place - a public park.

B. Chicago's public parks are the quintessential public fora.

Adding to the special protection for Petitioners' expressive activities is the fact that they were to take place in Grant Park, famous in Chicago for political rallies and demonstrations. Public parks, like streets and sidewalks, are the quintessential public fora, having been used for assembly and public disputation and colloquy from time immemorial. Regardless of who "owns" the parks, they are held in trust, not only for recreation but of at least equal importance, for "assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). While recreational activities are certainly a desirable part of societal life, the right to free speech must not be subjugated to the protection of frisbee-tossing, sunbathing, volleyball, or even baseball. Every one of us has the constitutional right to use parks for peaceful demonstrations and rallies, to air political views and complaints. *American Federation of Labor v. Swing*, 312 U.S. 321, 325 (1941). Use of the public ways for such demonstrations is an exercise of constitutional rights "in their most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Schemes that deny citizens these rights have been routinely and roundly condemned. *Kunz v. New York*, 340 U.S. 290, 294 (1951).

C. There is no historical support for the Seventh Circuit's conclusion that only content-based restrictions are considered prior restraints

The Court of Appeals concluded that only ordinances explicitly authorizing censorship of content are to be treated as prior restraints: "The regulation challenged here does not authorize any judgment about the content of any speeches or other expressive activity . . . ." (Pet. 3a). But history has

taught us that such decisions are often made in secret, with the reason publicly given for denial of the right to speak having nothing to do with the real basis for the action. [20]

Even if we return to Blackstone (as the Seventh Circuit felt compelled to do in order to find some support for its aberrant position) we see that the Seventh Circuit has strayed.[21] As long ago as the first half of the last century, we find this Court holding that an ordinance prohibiting the distribution of "circulars, handbooks, advertising, or literature of any kind" without a permit was an unconstitutional prior restraint, expressly noting that the ordinance did not allow the consideration of content. *Lovell v. Griffin*, 303 U.S. 444 (1938). More recently, in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) the Court invalidated a parade permit ordinance as an unlawful prior restraint, even though it did not authorize censorship.[22] Even more recently, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), six Justices of this Court said a Dallas ordinance requiring all sexually oriented businesses to obtain a license before operating was a prior restraint, even though it did not authorize consideration of content in the license decision-making process.

The Seventh Circuit ignored these precedents, asserting that license schemes regulating sexually oriented businesses require "greater judicial vigilance" than those restricting

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20. The only pertinent inquiry is whether censorship is a realistic result of the scheme, not whether it is expressly authorized. *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750 (1988).

21. "The liberty of the press is indeed essential to the nature of a free state; but this consists of laying no previous restraints upon publications . . . ." 4 W. Blackstone, Commentaries, 151-52.

22. There is no material difference between the *Shuttlesworth* ordinance and the Chicago Park District ordinance.

political speech, despite having previously recognized the unpopularity of Petitioners' message. (Pet. 11a). Since there is little chance of censorship of political speech, said the Seventh Circuit, it is unnecessary to treat licensing schemes such as the Park District's as a prior restraint.[23]

This Court never intended to allow core political speech to be so easily stripped of the First Amendment's protective mantle. If the Seventh Circuit's approach was the law of the land, one engaged in sexually oriented speech–described in *City of Erie v. Pap's A.M., Inc.*, 529 U.S. 277, 289 (2000), as speech at the outer perimeter of First Amendment protection–would receive more protection from prior restraints than one engaged in core political speech. Such a position is First Amendment blasphemy.

The Court of Appeals' insistence that no restraint is a prior restraint unless it is based upon the government's overt disapproval of the message is illogical and irrational, upon both experiential, as well as doctrinal grounds. It is in direct contrast to the pronouncements of at least six Justices of this Court in *FW/PBS*, 493 U.S. at 222-23.[24] The Park District

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23. Contrary to the strange comment of the Seventh Circuit that political speech needs little protection because it is not subject to the kind of suppression visited upon sexually explicit speech, history demonstrates that governmental attempts to suppress unpopular political speech remains virtually a daily occurrence. The observation that those seeking to engage in unpopular political speech in Chicago have little reason to fear governmental attempts to suppress their activities is particularly astonishing, coming from the same court (indeed, the same judge) that branded Chicago the political "censorship capital of the United States." *Nelson v. Streeter*, 16 F. 3d 145, 147 (7th Cir. 1994).

24. Justices Stevens and Kennedy joined the plurality, authored by Justice O'Connor. Justices Brennan, Marshall and Blackmun, in a

(continued...)

ordinance restricts the most valuable speech the First Amendment recognizes. It must be rejected in the most forceful terms, to deter even the *possibility* of government suppression of our most valuable resource-the arguments and discourse of our citizens.

D. The Chicago Park District permit ordinance is a prior restraint, and is presumed to be unconstitutional.

The Seventh Circuit failed to follow basic constitutional precepts developed over the past century by this Court when it held that the Park District permit ordinance is not a prior restraint. The panel found this Court's First Amendment jurisprudence, painstakingly constructed over the past century, not to be "a helpful formula." (Pet. 3a). The panel ignored this Court's numerous pronouncements regarding the use of public parks in holding that since the real purpose of parks is recreation, not "political and ideological agitation," a regulation restricting speech cannot be analyzed in the abstract, as doing so "invites semantic nitpicking and judicial usurpation of the legislative drafting function . . . ." (Pet. 4a-5a). Blatantly contradicting this Court's numerous holdings to the contrary, the panel found there "is reason to doubt that [prior restraint analysis] can provide much assistance to judges . . . ." (Pet. 4a). The Seventh Circuit's application of the time, place and manner test to the Park District Ordinance is simply illegitimate.

This Court has steadfastly reiterated, in a plethora of contexts, that any scheme which allows a governmental entity

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24. (...continued)
concurring opinion, left no doubt that the ordinance was a prior restraint. Therefore, six justices of this Court concluded that Dallas' *content-neutral* licensing regulation, requiring a business to obtain city permission before engaging in free speech, was a prior restraint.

to deny the use of a public forum in advance of actual expression is a prior restraint. The rule has been applied to every character of public activity, including solicitation of religious donations, *Cantwell v. State of Connecticut*, 310 U.S. 296, 306 (1940); parades, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992), *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); religious worship services, *Kunz v. New York*, 340 U.S. 290, 293 (1951), *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); solicitation of union membership, *Staub v City of Baxley*, 355 U.S. 313, 321 (1958); exhibiting movies, *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 140-41 (1968); distribution of pamphlets, *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); solicitation of charitable donations, *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801-02 (1988); publishing governmental information, *New York Times Co. v. United States*, 403 U.S. 713, 723 (1971); performance of theatrical productions, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553-54 (1975); commercial sales of sexually explicit goods, *Vance v . Universal Amusement Co., Inc.*, 445 U.S. 308, 312 (1980); and broadcasting investigative reports, *CBS, Inc. v Davis*, 510 U.S. 1315, 1316-17 (1994).

In Chicago one cannot hold a rally in a public park involving more than fifty people, or any number of people using amplified sound, without first obtaining government permission. In *Southeastern Promotions, Ltd. v. Conrad, supra*, this Court said a provision which gives "public officials the power to deny use of a forum in advance of actual expression" is a prior restraint. 420 U.S. at 553. The Chicago Park District ordinance certainly meets that definition. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) this Court reiterated that holding, describing an ordinance requiring a permit and fee before public speech, parades or assemblies in

a traditional public forum as a prior restraint.

This Court has repeatedly stated that any scheme whereby one must obtain a license to engage in free speech is a prior restraint. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 802 (1988); *Healy v. James*, 408 U.S. 169, 184 (1972). Such an ordinance comes to any court carrying very heavy baggage. It is presumed to be unconstitutional, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The government bears a heavy burden to overcome that presumption and justify any such restriction. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Ignoring this background of constitutional hostility to government efforts to interfere with political speech in public fora, the Seventh Circuit brushed aside decades of decisions that have served the cause of liberty and freedom well. Citing no authority, the Court turned First Amendment jurisprudence upside down, holding that since the ordinance did not expressly authorize the General Superintendent to engage in overt censorship, it was a time, place and manner regulation, not a prior restraint. Such a view ignores the political history of this country, and the reasons for the very existence of the First Amendment.

E. Not analyzing a permit requirement as a prior restraint places an intolerable burden on permit applicants.

The Seventh Circuit's formulation places a crushing burden on the average citizen who is denied the right to engage in political speech in a public park by an incorrect (or intentionally hostile or dishonest) denial of a permit. He is denied participation in making a record for a common-law certiorari review of the suppression of his proposed utterances. Confined to a meager, or non-existent record, he must overcome the presumption that the administrative agency was correct in denying his permit. And he must either do so *pro se*, while the agency is represented by government-paid counsel, or quickly find and retain counsel willing to engage in an emergency appeal. His other alternative is to find counsel to bring suit in the federal courts, where, if he is in the Seventh Circuit, he must not only commence the suit, but must also prove that the government's denial of his application for a permit was based upon hostility to him or his message-even though the government may have carefully avoided making any such damaging admission, using such vague reasons as an incomplete or incorrect application.

These hurdles are daunting, if not insurmountable. We will never know how many have been wrongly dissuaded by a simple denial from the Park District, because the Park District has refused to make that information available. We know that it takes a massive battle by courageous citizens to overcome these obstacles. That must end. If there be hurdles, it must be the Park District's task to overcome them to deny speech, not the other way around. Whatever the reason or the context, the government must always be required to bear the particularly heavy burden of justifying every act which results in prohibiting speech in a public forum. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

F. The Seventh Circuit is alone in deciding that a permit scheme restricting core political speech in a public forum is not a prior restraint

Two other circuits have spoken on this issue recently. The Second Circuit, in *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999), and the Eleventh Circuit, in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), both held that ordinances requiring permits for political speech in public parks are prior restraints.

In *Beal*, the Second Circuit reversed a trial court's holding that New York City's park permit ordinance was a time, place and manner regulation. The court recognized that conditioning the exercise of expressive activity on official permission constitutes a prior restraint on speech by giving "public officials the power to deny use of a forum in advance of actual expression." 184 F.3d at 124. The court explicitly recognized, as has this Court on numerous occasions, that a regulation may constitute a prior restraint even if it is not content-based. *Id.* The Eleventh Circuit, in *Cannabis Action Network*, reached the identical conclusion. 231 F.3d at 768.

The holdings of the Second and Eleventh Circuits are correct, and consistent with this Court's decisions. The Seventh Circuit must not be allowed to ignore settled law. The Seventh Circuit must be reminded that it cannot so simply allow the government to trample upon our most precious constitutional rights.

II. AS A PRIOR RESTRAINT, THE ORDINANCE CAN BE CHALLENGED ON ITS FACE.

The Seventh Circuit would require every unsuccessful applicant for a permit to speak to prove that the reason for the denial was the Park District's desire to suppress the content of their speech. Recognizing the "competing interests" for use of public parks, the panel cautioned lower courts in the Circuit against ruling on facial challenges, which it called decision-making "in the abstract," and stated:"[T]his must give pause to any court minded to strike down a permit regulation on its face and so without consideration of its application to a particular event for which a permit was denied." (Pet. 4a).

The idea that a challenge to an ordinance restricting free speech may only be made once it has been shown that a permit has been denied for an impermissible reason–flies in the face of the First Amendment and this Court's decisions. It makes judicial review of a permit denial meaningless.

This Court specifically rejected the concept that one's speech could be conditioned upon the speaker obtaining prior judicial approval before being allowed to communicate his ideas in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). Whatever the reason, the government must bear the particularly heavy burden of justifying every action which results in prohibiting speech in a public forum. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The proposition that any scheme which requires the government to be consulted and give its assent before one may speak publicly is a prior restraint applies to any and every kind of speech, whether it be a newspaper, handbill distributed by hand, solicitation for money, theatrical performance, or a diatribe by one standing on a soap box. Such a scheme can survive only under the strictest of safeguards because any such scheme carries within it the dangers of censorship. *Blount v. Rizzi*, 400

U.S. 410, 419-21 (1971); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42 (1968).

A. The ordinance contains so much discretion that a facial challenge is the only meaningful vehicle for judicial review.

In *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 755-56 (1988), this Court reaffirmed the principle that facial challenges can be brought against ordinances that contain unlawful discretion without even subjecting oneself to their procedures, because the dangers posed by the very existence of these ordinances are so serious they require immediate consideration by the federal courts. This Court has long recognized the difficulty of effectively detecting, reviewing and correcting content-based censorship "as applied" without standards by which to measure the licensor's actions. It is because statutes like the Code in this case pose a serious risk of clandestine censorship that courts must entertain immediate facial attacks on such schemes. *Id.* at 759.

The Seventh Circuit concluded that the Park District ordinance poses no real danger to freedom because it contains only a little discretion.[25] This is in stark contrast to the opinion of Magistrate Judge Keys, who wrote:

> [T]he plain language of [subsection C(5)(e) of the ordinance] fails to provide any neutral criteria to guide the Park District's: determination of what conduct constitutes a material misrepresentation, a

25. The Seventh Circuit is as critical of facial challenges as it is of the prior restraint doctrine: "All [Petitioners'] contention regarding the vagueness of 'material misrepresentation' shows is the limits of language and so the inherent limitations of 'facial challenges.' " (Pet. 5a).

> violation of a prior permit, a material falsehood on an application, or damage to Park District property on a prior occasion (collectively referred to herein as "alleged misconduct"); decision as to who was responsible for the alleged misconduct; and decision as to which applications (where misconduct has been found) should be permitted anyway.
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> Similarly, there are no neutral criteria in the Ordinance for what type of evidence is required to prove alleged misconduct, or even an indication that any proof is necessary. Further, it is not clear who at the Park District is designated to make these determinations – it appears that any Park District employee could make a notation in a file that a prior permittee violated some provision of the Ordinance. Most troubling, however, is the omission of any limit regarding how long an instance of alleged misconduct can cause an individual to be barred from obtaining a permit. The Ordinance provides no maximum penalty. Thus, it appears that the Park District could choose to exercise its discretion to prevent someone from ever getting a permit again. This subjective determination could be even more invidious due to the fact that permit seekers whose audiences have caused prior permit violations (resulting in alleged misconduct vis-a-vis the permittee) are likely those whose speech generates the

most public outcry.

(Pet. 64a-65a) (footnote omitted; emphasis in original).

Magistrate Judge Keys was right. Vagueness permeates the entire ordinance, a vice this Court has repeatedly found subject to facial attack. *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). Facial challenges are allowed in order to protect the rights of all society. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). They may not be swept away as cavalierly as the Seventh Circuit attempts to do. Only by allowing the courts to swiftly review, by way of facial challenges, the text of governmental schemes which by their very existence discourage citizens from standing up to be heard, will the First Amendment remain strong and true to its purpose. If we allow every case challenging government interference with citizen speech to become bogged down in exploring the inner workings of bureaucratic minds, to determine "why" they denied permission to speak, we allow the government a right of filibuster which will make the First Amendment a dead letter, devoid of any teeth to enforce its guarantees. Every attempt to interfere with free political speech in traditional public fora must be repelled in the most decisive, speedy and forceful manner possible. Facial challenges must remain as our first bulwark against governmental interference with speech, for whatever reason and under whatever guise.

B. The Seventh Circuit acknowledged that the ordinance gave the Park District unfettered discretion.

The Seventh Circuit agreed with Petitioners that the ordinance contains a grant of standardless discretion that poses the very danger of censorship that this Court has routinely condemned. The ordinance lists numerous grounds for denial of a permit. However, denial is completely discretionary. As

Petitioners argued, as Magistrate Judge Keys expressly found, and as the Seventh Circuit reluctantly recognized,[26] this provision would allow the General Superintendent to forgive previous permit violations of groups with a message he (or his political allies) favored, while using prior violations as an excuse for banning speech he found not to his liking.

Incredibly, the Seventh Circuit said this discretion was good! According to the panel, if the permissive word "may" were replaced by the mandatory word "shall," thus requiring the General Superintendent to visit the identical consequences on all wrongdoers, regardless of the content of their message, the ordinance would be "more restrictive" of free speech. The Circuit Court found it desirable that the General Superintendent has the power to give new permits to his friends who violated the rules in the past, while denying permits to those with whom he disagrees who violated the same rules. This is an untenable proposition, allowing *sub rosa* censorship, the very reason for allowing facial challenges. This Court must once more condemn such slavish pandering to governmental misuse of power.[27]

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26. "The plaintiffs argue that this power of mercy arms the park district to pick and choose among applicants on political grounds. *It indeed creates such a danger . . . .*" (Pet. at 6a) (emphasis added).

27. The practical effect of removing the discretion here would be that the Park District would have to eliminate this provision altogether. The Park District could not "stand the political heat" if it had to deny permits to large, public service groups with popular messages but with prior permit violations.

III. PROMPT ACCESS TO THE COURTS FOLLOWING DENIAL OF A PERMIT APPLICATION IS MEANINGLESS WITHOUT A REQUIREMENT FOR A PROMPT JUDICIAL DECISION.

Once the Court determines that an ordinance is a prior restraint, and is subject to a facial challenge, it must resolve the critical issue of which of the procedural safeguards mandated by *Freedman v. Maryland* must accompany such an ordinance. And in reaching its decision, the Court will resolve the conflict that has perplexed and divided the circuits: what is meant by the phrase "prompt judicial review?"

A. The decision in *Freedman v. Maryland* contemplated swift judicial action to protect speech from unlawful prior restraints.

In *Freedman*, the Court never suggested that mere access to the courts satisfied the need for prompt judicial review:

> [B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid prior restraint . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film . . . [T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 58-59.

In *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42 (1968), the court said that a licensing procedure "must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

This Court has never held that mere access to the courts was sufficient. That proposition came from the Seventh Circuit's plurality opinion in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993)(en banc), *cert. denied*, 511 U.S. 1085 (1994), where the Court asserted repeatedly it was not dealing with a First amendment issue.

B. *FW/PBS* did not limit *Freedman*'s requirement for prompt judicial review.

In *Graff*, five judges decided that this Court had eliminated the need for a prompt judicial decision, by referring to the plurality opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).[28] Specifically, the *Graff* opinion referenced the following language from *FW/PBS*: "[T]here must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Graff*, 9 F.3d at 1324 (citing *FW/PBS, Inc.*, 493 U.S. at 228).

As the Seventh Circuit noted in this case, *Graff* was decided by a "badly fractured" court, and resulted in a plurality opinion of five judges. (Pet. 8a). *Graff* provided the underpinning for each of the Seventh Circuit's decisions in this case, as well as the judgment of the district court. But the dictum in *Graff* about the applicability of *Freedman*'s procedural safeguards is just plain wrong, and must be

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28. The plurality in *Graff* included each of the judges comprising the panel in this case.

expressly repudiated.

This Court in *FW/PBS* did not intend the result reached by the *Graff* plurality. The Seventh Circuit's conclusion was correctly rejected in *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998):

> The meaning of "prompt judicial review" in the context of adult business licensing schemes has been considered by five circuits since the Court rendered its plurality decision in *FW/PBS*. The Fifth and Seventh Circuits have held that prompt access to judicial review is sufficient, even if there is no time frame for a hearing or a decision on the merits. *See TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 709 (5th Cir.1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993)(en banc). The Fourth and Sixth Circuits have held that prompt judicial review requires a prompt decision on the merits. *See 11126 Baltimore v. Prince George's County, Md.*, 58 F.3d 988 (4th Cir. 1995)(en banc); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995). The Eleventh Circuit rejects the view that mere access to judicial review is sufficient, but has not said what more is required to satisfy the prompt judicial review standard. *See Redner v. Dean*, 29 F.3d 1495, 1501-02 (11th Cir.1994).
>
> We reject the view of the Fifth and Seventh Circuits that mere access to judicial review is sufficient. As the Seventh Circuit acknowledged in *Graff*, "[a] person always has a judicial forum when his speech is allegedly infringed." *Graff*, 9 F.3d at 1324. Thus, to hold that mere access to judicial review fulfills the second *Freedman* safeguard makes the safeguard itself meaningless. We conclude that "prompt judicial review" means the opportunity for a prompt hearing and a prompt decision by a judicial officer.
>
> The phrase "judicial review" compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless.

154 F.3d at 1101-02.

Prompt judicial review must include a requirement for a prompt decision. The survival of political speech contrary to the government's position depends on it.

IV. THE GOVERNMENT MUST BEAR THE BURDEN OF INITIATING JUDICIAL REVIEW, AND THE BURDEN OF PROOF IN COURT, WHEN IT DENIES ITS CITIZENS THE RIGHT TO ENGAGE IN POLITICAL SPEECH IN A PUBLIC FORUM.

One of our oldest adages is "you can't fight City Hall." While this is not always true in our American democracy, there is no question that government decision-makers have an enormous advantage over citizens in terms of authority and resources. The government has the raw power to require permits in order to participate in public political speech. That authority is backed by the police power, including such coercive measures as arrest and fines. Government also has access to the public coffers as well as the expertise of staff attorneys, allowing it to use funds taken from the citizens to

suppress their rights. In contrast, the citizen has only the power of his own voice and the persuasiveness of his ideas.

A. **It is the government's burden to initiate judicial review when it denies a permit.**

Traditionally the Courts have provided the final bulwark against government oppression (whether intentional or the result of bureaucratic incompetence). This Court has long recognized the need for judicial review of licensing decisions affecting free speech rights:

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.

Freedman, 380 U.S. at 58.

The problem for citizens is getting to that fair hearing where resources are limited and the obstacles are often overwhelming. In *Freedman*, this Court unequivocally placed the burden on the government to justify denials of permits where free speech interests are at stake:

> First, the burden of proving that the film is unprotected expression must rest on the censor . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.

Id. at 58-59.

The requirement that government initiate litigation ensures that judicial review will occur even when the applicant lacks the funds to pursue the court battle himself. In order to sustain a permitting decision, the government will be required at a minimum to make a prima facie case supporting the denial of speech.[29] Under this arrangement, arbitrary or content-based decision-making will not pass judicial review even if the applicant cannot afford an attorney to champion his cause.

Government--in this case the Park District--routinely claims that it no longer bears the burden of initiating judicial review when it denies a license for free speech activities. That position was sustained by the Seventh Circuit below, although other courts have criticized the rationale underlying that decision. The Seventh Circuit's argument is based exclusively on the plurality opinion in *FW/PBS, Inc.* However, that position is neither an accurate statement of the law nor desirable policy.

In *FW/PBS*, after having found that the Dallas adult business licensing law was an unconstitutional prior restraint the plurality opinion said that requiring the government to institute review of a permit denial was not necessary in the context of adult businesses. Three other Justices would have continued the requirement that government initiate review of permitting decisions. The remaining Justices would have found the law constitutional under a variety of theories, but none wanted to retreat from *Freedman*. Nothing in that decision

---

29. The imposition of the burden of proof on government was not an invention of the *Freedman* Court, but arose from precedent established long before that decision. *Freedman* itself relied on eloquent language found in *Speiser v. Randall*, 357 U.S. 513, 526 (1958): "Where the transcendent value of speech is involved, due process certainly requires ... that the State bear the burden of persuasion to show that the appellants engaged in criminal speech."

supports the proposition that a potential political speaker, frustrated by the government, must initiate suit to vindicate the right to publicly air political views.

The circumstances facing political activists bear little resemblance to those governing sexually oriented businesses. Prompt judicial disposition is imperative to preserve the rights of political activists faced with a prior restraint on speech. Judicial review is no comfort to the permit applicant if the date for his parade has passed, the election is over, or the particular "hot button" political issue is now cold and stale.

Contrary to the Seventh Circuit panel's position(Pet. 11a-12a), political speech is entitled to *at least* the same protection as the fare offered by sexually oriented businesses. Indeed, that was the basis for the Eleventh Circuit's decision in the nearly identical factual situation in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000).[30] In that case, political activists challenged a permit ordinance, and the Eleventh Circuit found it unconstitutional. The City had argued that *FW/PBS* eliminated the requirement that the government must initiate judicial review. The Eleventh Circuit disagreed, finding that precedent and policy demanded the continuation of that constitutional protection for political speech in a public forum:

> The argument for relaxing the procedural safeguards is not as strong in this case as it was in *FW/PBS*. As we recognized in *Boss Capital*, the pre-*FW/PBS* cases predominantly involved censorship, and *FW/PBS* was the first case to confront a licensing ordinance for adult entertainment

30. The City of Gainesville filed a Petition for Writ of Certiorari which is pending in this Court. (No. 00-1503).

establishments. *See* 187 F.3d at 1256. In *FW/PBS*, only a plurality of the Court was willing to relax *Freedman*'s third procedural safeguard in the less protected context of a sexually oriented licensing scheme. *See* 493 U.S. at 228, 110 S.Ct. at 606. In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum. Thus, once again, "[w]e believe this is a situation for 'treating unlike things differently according to their differences.'" *Boss Capital*, 187 F.3d at 1256 (quoting *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999)). The right to speak sought by CAN in this instance deserves greater protection than that outlined by the plurality in *FW/PBS*. Accordingly, we decline to relieve the City of the requirement that its Street Closing Ordinance meet Freedman's first procedural safeguard. (footnote omitted).

Cannabis Action Network, Inc., 231 F.3d at 775-76. (footnote omitted).

The Eleventh Circuit's well-reasoned decision in *CAN* should be contrasted with the limited analysis engaged in by the Seventh Circuit in the instant case, confined to a single paragraph:

> The plaintiffs argue that the park district should in every case in which it denies a permit be required to seek judicial review of its own action. The argument is based

> on a misreading of *Freedman v. Maryland, supra*, 380 U.S. at 58-59, 85 S.Ct. 734, which holds only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems. The Supreme Court made that clear in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228- 230, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion), *id.* at 244, 110 S.Ct. 596 (concurring opinion), *id.* at 249, 110 S.Ct. 596 (concurring and dissenting opinion).

(Pet. 9a).

The fundamental flaw in the Seventh Circuit opinion is, of course, the notion that content neutral licensing systems are somehow exempt from prior restraint analysis. There is no question that the licensing ordinance at issue in *FW/PBS*, was completely content neutral. However, the fact that the law did not discriminate on the basis of content did not save it from being declared an unconstitutional prior restraint by this Court.

Government frequently argues that it is burdensome and costly to impose the *Freedman* litigation requirement on local authorities. Such claims are sometimes accompanied by "Chicken Little" predictions of public disorder and general mayhem. However, the record in this case is devoid of any suggestion that the Park District was flooded with applications or that it had cause to deny many of them. In contrast, the deleterious effect of a permit denial on an activist's free speech rights is undeniable. *Elrod v. Burns*, 427 U.S. 347 (1976).

Unless the government is required to institute legal action, as contemplated by *Freedman*, all the other rights secured by the First Amendment are likely to fall by the

wayside. As stated by the Seventh Circuit, actually following *Freedman* in an earlier Park District case:

> We are hesitant to impose on municipalities the necessity of resorting to court injunctive procedure every time it is decided that a permit for use of public property should properly be denied. Nevertheless, in the sensitive area of prior restraint of freedom of expression this is a necessary due process procedure.

Collin v. Chicago Park District, 460 F.2d 746, 756 (7th Cir. 1972).[31]

B. The government must also bear the burden of proof in the judicial review proceeding.

In addition to seeking judicial review, the Park District must also be required to bear the burden of proof, if the mandate of *Freedman v. Maryland* is to survive. Otherwise, only money and access to competent counsel, not the protection of the First Amendment, will protect political speakers from government censorship.

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31. One of the most distressing aspects of the Court of Appeal's decision in this case is the fact that the panel completely ignored *Collin*, a prior decision that did recognize the First Amendment rights of citizens to be heard in the public parks and streets. Although Petitioners repeatedly relied upon the decision in *Collin*, (as did the Magistrate Judge), the panel apparently overruled it *sub silentio*.

However, assigning responsibility for the burden of proof is probably redundant. The plaintiff in every litigation has the burden of proof. When injunctive relief is sought, the plaintiff has a heavy burden because injunctive relief is an extraordinary remedy not to be issued lightly. It is an extraordinary remedy reserved for extraordinary causes. *Ex parte Collett*, 337 U.S. 55, 72 (1949). Therefore, so long as the Court properly visits the burden of initiating judicial review on the government when a permit is denied for core political speech, the burden of proof will follow automatically.

Of course, as we have discussed earlier, this Court has always required the government to bear the burden of justifying any restrictions on speech, particularly in public fora. The government may not transfer this burden to a potential speaker by requiring a permit before one can be heard in a public place. If the First Amendment is to retain its meaning, the onus of justifying any prohibition of any citizen from being heard must remain on the would-be suppressor, regardless of the asserted reason, or the situation in which the prohibition is sought.

V. IN ADDITION TO FOLLOWING THE MANDATE IN *FREEDMAN v. MARYLAND*, THE GOVERNMENT MUST AVOID UNDUE DISCRETION WHEN IT REQUIRES A PERMIT TO ENGAGE IN CORE POLITICAL SPEECH IN A PUBLIC FORUM.

The permit procedure ordinance upheld by the Seventh Circuit in this case contains so much discretion that the General Superintendent can deny virtually any permit application and force the applicant to protracted and expensive litigation to secure the right to be heard. Such a scheme threatens core political speech to an extent that cannot be tolerated.

A. There is a long judicial history of enmity towards discretion in free speech permit cases.

This Court, in *FW/PBS*, spoke of what it called the "evil" of discretion:

> Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). *See Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. Birmingham, supra; Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). " 'It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' " *Shuttlesworth, supra*, 394 U.S., at 151

(quoting *Staub, supra,* 355 U.S., at 322).

493 U.S. at 225-26.

In spite of this clear language, and the plethora of cases striking down such ordinances because of too much discretion, the Seventh Circuit has chosen to strike out in a different, and constitutionally invalid, direction.

B. **The Seventh Circuit has relaxed the prohibition against unbridled discretion, threatening to emasculate core political speech.**

The district court, relying solely on the Seventh Circuit's opinion in *Graff*, found the standards of the ordinance regulating issuance and denial of permits specific enough to withstand constitutional scrutiny. (Pet. 84a-85a)[32] The district court observed that "[w]hile . . . section C(5)(e) contains some ambiguities and places a certain modicum of discretion with Park District officials, "[n]ot all discretionary decisions implicate the First Amendment." *Graff*, 9 F.3d at 1319 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993)). (Pet. 85a).

The Seventh Circuit panel followed suit, finding the discretion in the ordinance acceptable. An example of why the district court and the Seventh Circuit panel were wrong is found in the panel's determination that the phrase "the Park District may deny an application for permit" does not create unlawful discretion. The panel wrote:

> [The Plaintiffs] complain that the grounds for denial of a permit are permissive. The park district "may" deny a permit because of a misrepresentation, the failure to tender the fee, having damaged the property of the park district on a previous occasion, or other grounds listed in the regulation, but it is not required to; it can forgive. The plaintiffs argue that this power of mercy arms the park district to pick and choose among applicants on political grounds. It indeed creates such a danger; but if this discretionary feature of the regulation were excised, the regulation would be more restrictive than it is . . . .

(Pet. 6a).

32. Of course, as a restriction on political speech, the ordinance must withstand the most exacting scrutiny. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

Actually, the panel has made the ordinance sound better than it is. The ordinance allows a permit to be denied for a variety of reasons, most of which would allow an unlawful denial to masquerade as a valid rejection.

The Park District ordinance allows the following to occur: John Speaker obtains a permit for a political rally in support of a position strongly opposed by the mayor, or the Park District, or its General Superintendent, or other powerful bureaucrat or campaign contributor with influence at City Hall. He holds his rally, a large crowd attends, and emotions run high. Fights occur. Shrubbery is damaged. People remain in the park long after the event, drinking and being rowdy. Mr. Speaker, who has no authority whatsoever to control these events or to remove anyone from a public park, concludes his event and leaves the park within his allotted time. He breaks no law, causes no damage and sanctions no improper behavior.

Sometime later, Mr. Speaker applies for another permit, for a similar rally. The General Superintendent can use a

number of provisions to deny him a permit. He will be silenced, not for *his* actions but for the unlawful actions of others over whom he has no control, and indeed, who may be strongly opposed to his message. This scenario is not fanciful or imagined; this is *precisely* what happened to Robert MacDonald. It cannot be allowed to happen again.

CONCLUSION

Freedom of speech is one of our most fragile rights, vulnerable to gravely damaging yet barely visible encroachments. *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. at 66. It must be ringed with adequate bulwarks, the most rigorous procedural safeguards. *Marcus v. Search Warrant*, 367 U.S. 717, 730--31 (1961). It may be restrained in only a few narrowly circumscribed circumstances, and only under strict judicial supervision. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957). The separation of legitimate from illegitimate speech requires sensitive tools. *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

Petitioners have attempted to engage in core political speech. Contrary to the belief of the court below, the right of Petitioners to utter that speech, and the rights of others to hear their message, is more important than maintaining the recreational aspects of the public parks. Contrary to the thesis upon which the panel's opinion is based, whether the Park District is protecting the grass and flowers, or engaging in a clandestine attempt to suppress speech with which it disagrees, is of no moment. It can have no legitimate reason to suppress or stifle free speech. As this Court has repeatedly recognized, placing any barriers in the way of the expression of such speech has the potential to chill its exercise. The cavalier comment by the Court of Appeals that all one need do to vindicate the right to speak in a park is to sue a large metropolitan government in state court, and also file a second suit in federal court, if

necessary, is disingenuous. (Pet. 10a). Being required to make "a federal case out of it," by itself, may be more than enough to convince all but the most committed to give up the effort to pronounce their views publicly as being not worth it. Requiring them to bear the burden of proof that the denial is based upon an active dislike of their potential message not only turns the First Amendment on its head, it goes a long way in guaranteeing that the government will succeed in its attempts to suppress dissent. This court must declare in the most forceful and unmistakable terms that placing these kinds of road blocks in the path of the citizenry will not be countenanced.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,
Petitioners,

v.

CHICAGO PARK DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

An ordinance of the Chicago Park District requires that individuals obtain a permit before engaging in certain activities on Park District property. Those activities include conducting a public assembly involving more than fifty people and using sound amplification equipment, along with many activities that are not ordinarily related to expression. The ordinance specifies grounds on which a permit may be denied, none of which refers to the content of expression.

The questions presented are:

1. Whether the ordinance violates the First Amendment because it does not require the Park District to initiate judicial proceedings when it denies a permit.

2. Whether the ordinance violates the First Amendment because it does not provide that judicial review of a permit denial must be completed within a specified time.

3. Whether the specified grounds for denying a permit give the Park District excessive discretion, in violation of the First Amendment.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT

STATEMENT

1. The Chicago Park District, a municipal corporation established by the state of Illinois, owns more than 7300 acres of parkland in the City of Chicago, including 552 parks, 33 beaches, nine museums, two world-class conservatories, and ten bird and wildlife gardens. See 70 ILCS 1505/1 *et seq.*; City of Chicago Fact Book 65. Chicago's lakefront parks, the most intensively used part of the system, include 2990 acres and 24 miles of shoreline. They were the product of a plan first conceived by Daniel Burnham in 1886, then formally incorporated in his 1909 Plan for Chicago. See II Charles Moore, Daniel H. Burnham: Architect, Planner of Cities 97-115 (1921); Thomas S. Hines, Burnham of Chicago 331-45 (1974). Chicago is notable, among American cities, for "intensively managing and using virtually every inch of

[park]land, unlike most other cities that have large tracts of undeveloped properties[.]" Peter Harnik, Inside City Parks 25 (Urban Land Institute 2000).

Each year, millions of people use Park District property, both for informal recreation and for programmed events, such as day camps, sports leagues, and band concerts. In addition, thousands of special events take place on Park District property annually. See R. 123.[1] Ordinances adopted by the Park District regulate the use of the parks. The ordinances, for example, prohibit the possession of alcoholic beverages on Park District property and regulate such activities as bringing vehicles or animals into the parks and starting fires in the parks. See, *e.g.*, Park Dist. Code, Ch. VII, § B. 5. e.; *id.*, § B. 6.; *id.*, § B. 7; see J.A. 111-13.[2] Other ordinances specify that any person wishing to engage in certain activities on Park District property must obtain a permit before doing so. For example, no person may, without a permit, erect any structure, conduct a sporting event, or offer goods for sale on Park District property. Code § C. 3. a. (7), (9), (12); J.A. 134-35. Among the activities for which permits are required are "conducting a public assembly, parade, picnic, or other event involving more than fifty people" (Code § C. 3. a. (3)) and "creat[ing] or emit[ting] any Amplified Sound" (*id.*, § C. 3. a. (6)). See J.A. 134. A person who violates the Code, or the terms of a permit, is subject to a $500 civil penalty. Code § B. 18; *id.*, § C. 7; J.A. 129, 150.

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[1] "R." refers to the record filed in the court of appeals.

[2] Pertinent provisions of the Park District Code are reproduced at J.A. 103-150. We will cite provisions of Chapter VII of the Park District Code as "Code § __."

In their brief, petitioners cite to an older version of the Code that appears as an appendix to the complaint, at J.A. 59-76. That version of the Code is not in issue in the case; it has been superseded by the version that appears at J.A. 103-150.

Each year, the Park District receives thousands of applications for permits. See R. 62; Pet. App. 7a. The lakefront region of the Park District employs three full-time, year-round employees, plus two summer interns, to coordinate and process special event permit applications. R. 123. Between January 1 and August 1 of this year, the Park District granted more than 1,000 permits for events in the lakefront parks.[3] These permits were for a variety of activities, including professional sports events, week-long festivals attracting tens of thousands of visitors, concerts by nationally-known and local music groups, softball and soccer games, charity benefit walks, private parties, weddings, picnics, and family reunions, as well as political demonstrations.

2. The Park District Code provides that the Park District must grant or deny an application for a permit within fourteen days, unless it extends the period by an additional fourteen days by written notice to the applicant. Code § C. 5. c, d; J.A. 144. Any application not acted on by the deadline is deemed to be granted, conditional upon any of the requirements (such as the payment of a security deposit) being satisfied. Code § C. 5. b; J.A. 144. An applicant who is denied a permit has the right to an administrative appeal to the General Superintendent of the Park District, who must act on the appeal within seven days. Code § C. 6; J.A. 147-48. The applicant may create a written administrative record by submitting "any * * * papers material to the determination" to the Superintendent. Code § C. 6. b; J.A. 148-49.

A Park District ordinance requires that any denial of a permit application be made in writing. The notice of denial "shall clearly set forth the grounds upon which the permit was

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[3] We have lodged with the Clerk, and sent to opposing counsel, a copy of Park District records showing the details of these permits. See Brief for the Respondent Lodging Material.

denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit." Code § C. 5. e; J.A. 145. Chapter VII, Section C. 5. e. of the Park District Code specifies, in detail, the grounds on which permits may be denied. See Appendix, *infra*.[4]

3. In August of 1996, Robert MacDonald, petitioners' predecessor, applied to the Park District for permits to conduct two festivals, the "Festival of Life" and the "Yippie! Festival of Life," in Grant Park. See J.A. 81. The Park District granted both permits. Two weeks after the festivals, the Park District sent MacDonald a letter notifying him that it would withhold his security deposit because it had incurred additional expenses in connection with cleaning up after his events. Pet. App. 18a. The letter also noted that multiple violations of the permits' terms occurred at the events, including such things as "alcohol consumption; unpermitted vendors; unpermitted vehicles; unpermitted tents and canopies; improper location of the generator, in violation of the fire code; and loitering by individuals who remained in the park past 11:00 p.m." *Ibid.*

On March 4, 1997, MacDonald applied for a permit to hold an event in May of that year. J.A. 77-78. Eight days later, the Park District denied the application. *Id.* at 81-83. The Park District's letter explaining the denial cited, among other things, the multiple violations of the August 1996 permits. *Ibid.* MacDonald appealed the denial to the General Superintendent. *Id.* at 84-88, 96-101. The General Superintendent denied the appeal, with an explanation of his reasons. *Id.* at 89-95, 102.

[4] This provision appears at J.A. 145-47, but for convenience we have also reproduced it as an Appendix to this brief. The Joint Appendix misnumbers this provision as § C. 5. d. (The two provisions that appear before it, on J.A. 144, are also misnumbered).

MacDonald then brought suit against the Park District in the United States District Court for the Northern District of Illinois. MacDonald sought both an injunction allowing him to hold the event in May and an injunction prohibiting the Park District from enforcing its permitting ordinance on the ground that the ordinance was unconstitutional on its face and as applied to him. See J.A. 47-57.

The district court denied MacDonald's request for a preliminary injunction requiring the Park District to grant the permit for the May event. R. 16. MacDonald held the event nonetheless. Approximately 5,000 people attended. 7/21/97 Tr. 10; R. 62.[5] The Park District did not attempt to stop the event and in fact cooperated with MacDonald by supplying garbage cans and opening bathrooms for participants. Pet. App. 20a-21a.

MacDonald continued in his effort to have the ordinance declared unconstitutional. The district court initially granted in part, and denied in part, a second motion for a preliminary injunction against the enforcement of the ordinance. *MacDonald v. Chicago Park District*, 976 F. Supp. 1125 (N.D. Ill. 1997). The United States Court of Appeals for the Seventh Circuit vacated the preliminary injunction. *MacDonald v. Chicago Park District*, 132 F. 3d 355 (7th Cir. 1997). During this time, MacDonald sought and received a permit to hold an event in August 1998. Pet. App. 21a n. 8. The Park District denied a permit for another event for reasons having to do with, among other things, the unsuitability of the area in which MacDonald sought to hold the event. MacDonald did not seek administrative review of the denial. *Id.* at 22a.

On remand from the Seventh Circuit's decision, the district court—now confronting only a claim that the ordinance was

[5] "7/21/97 Tr." refers to the transcript of the hearing held on that date.

unconstitutional on its face [6]—granted summary judgment in favor of the Park District. Pet. App. 75a-90a. The district court rejected MacDonald's claim that various provisions of the ordinance gave the Park District excessive discretion to deny a permit. The court ruled that the standards specified in the ordinance were "specific and objective criteria for evaluating permit applications." *Id.* at 84a.

In June, 1999, after the district court decision, MacDonald died, and the current petitioners were substituted as appellants. We note that the Park District has granted petitioners' applications for permits to hold festivals on at least three occasions during this year, on May 19, July 28, and October 13. See Lodging Material, cited at page 3, note 3 *supra*, at 9, 42, 68.

4. The Seventh Circuit affirmed the district court's decision. Pet. App. 1a-12a. The court, noting that petitioners had insisted that the Park District ordinance be classified as a prior restraint, remarked that "the heterogeneity of the practices that the 'prior restraint' formula covers" made that rubric "not * * * a helpful formula." *Id.* at 3a. In particular, the court of appeals explained, the Park District ordinance was different from other "prior restraints" because the ordinance "does not authorize any judgment about the content of any speeches or other expressive activities—their dangerousness, offensiveness, immorality, and so forth." *Ibid.* The court added that "[i]t is not even clear that the regulation

[6] After the preliminary injunction was vacated, the Magistrate issued a report recommending that the Park District be granted summary judgment on the "as applied" challenge. C.A. App. A30; R. 100-101. ("C.A. App." refers to the appendix filed with the court of appeals.) MacDonald did not file objections to the recommendation that summary judgment be granted against him on the "as applied" challenge, and the district court adopted the recommendation. C.A. App. A60. MacDonald did not appeal. Petitioners agree with us that the "as applied" challenge is not before this Court. See Pet. Br. 2 ("This is a facial challenge to [the Park District] ordinance.").

reduces the amount of speech. A park is a limited space, and to allow unregulated access to all co[m]ers could easily reduce rather than enlarge the parks' utility as a forum for speech." *Ibid.* For that reason, the court concluded, "a permit requirement is a sine qua non of managing a park system in a way that will preserve the value of the parks for the general public." *Id.* at 4a.

Against this background, the court of appeals turned to the question whether the ordinance conferred unconstitutionally broad discretion on the Park District. The court noted the danger that such a claim could "invite[] semantic nit-picking and judicial usurpation of the legislative drafting function." Pet. App 5a. The court rejected as "frivolous" petitioners' claim that the ordinance gave the Park District too much discretion because the terms "material" and "misrepresentation," in the provision of the ordinance allowing a permit to be denied because of material misrepresentations in connection with prior permits, were vague. *Ibid.* The court said that petitioners' arguments merely "show[ed] * * * the limits of language and so the inherent limitations of 'facial' challenges." *Ibid.*

The court of appeals then rejected petitioners' claims that the First Amendment forbade the Park District from forgiving some violations of permit conditions and from waiving requirements of insurance and a security deposit. Pet. App. 6a-7a. The court also ruled that "since thousands of permit applications are filed with the park district each year," the Park District's deadlines for administrative action were reasonable. *Id.* at 7a.

Finally, the court of appeals rejected petitioners' argument that the Park District's permit requirement violated the First Amendment because it did not contain adequate provision for judicial review. The court noted that individuals whose permit applications are denied may resort either to state court, which

can review a Park District decision by issuing a common law writ of certiorari, or to federal court, by virtue of 42 U.S.C. 1983. Pet. App. 8a-11a. The court of appeals rejected petitioners' argument that *Freedman v. Maryland*, 380 U.S. 51 (1965), required the Park District to initiate judicial proceedings whenever it denied a permit; *Freedman*, the court of appeals explained, "holds only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems." Pet. App. 9a.

The court of appeals also declined to require that a deadline be imposed on judicial proceedings reviewing a permit denial. The court noted that such a deadline could "both disrupt the orderly management of a judicial docket and conduce to hasty decision making." Pet. App. 11a. The court of appeals concluded (*id.* at 12a): "Especially in the absence of any showing, which has not been attempted, that the Chicago Park District is trying to restrict the expression of unpopular ideas or that the state courts are not acting with reasonable promptitude on appeals from permit denials, a more relaxed attitude toward the pace of judicial review is warranted than in the case of regulation targeted at unpopular expression."

SUMMARY OF ARGUMENT

The Park District's permit ordinance is part of a comprehensive effort to manage an intensely used system of urban parks. The ordinance is in no way concerned with the content of expression, and indeed only incidentally affects expression at all. Procedural requirements that this Court designed for content-based censorship schemes are, therefore, wholly inappropriate for the Park District's ordinance. Moreover, as a practical matter, it would be completely unworkable to attempt to apply those requirements in this context.

I. The First Amendment does not require the Park District to initiate litigation when it denies an application for a permit. This conclusion follows *a fortiori* from *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), where the Court ruled that a local government agency responsible for licensing sexually-oriented businesses was not required to initiate litigation to defend its denial of a license. In addition, a requirement that the Park District initiate litigation whenever it denies a permit would be utterly unworkable. The Park District receives thousands of permit applications each year, and many must be denied for wholly uncontroversial reasons—because the requested location is already being used or is in some other way unsuitable, for example. No one's interests would be served by requiring the Park District to bring a lawsuit each time it denies such an application.

II. The First Amendment also does not require that the Park District's ordinance specify a deadline for the judicial resolution of a challenge to a permit denial. Such a deadline makes sense only if, as the Court has required in connection with censorship schemes, the judicial proceedings are initiated by the government and the private party is entitled to remain passive; the deadline then ensures that the government will expedite the litigation. When a private party initiates litigation, that party is free to request emergency relief or expedition. Courts can evaluate such requests in the way they do in all litigation—by considering the facts of the particular case before them.

In addition, since the Park District cannot control whether courts meet a deadline, the practical effect of a judicial deadline would be to require the Park District to issue a permit whenever courts fail to resolve a case on time. The Park District could then be compelled to issue permits for conflicting uses of the same area of the parks, or for uses that threaten the infrastructure of the parks, or for obviously

inappropriate uses of the parks. The First Amendment does not require such irrational results.

III. The standards specified in the ordinance more than adequately confine the Park District's discretion. Indeed, the Park District ordinance confers much less discretion than other permit regulations that this Court has upheld.

Petitioners assert that the ordinance is unconstitutional because it allows the Park District to grant a permit even when one of the standards has not been met. But to deprive the Park District of that form of discretion, analogous to the familiar discretion of executive agencies to decline to initiate enforcement proceedings, not only would be impractical; it would greatly disserve First Amendment values by, among other things, requiring the Park District to deny permits to every individual whose permit application is in some way technically deficient.

In any event, because the Park District ordinance predominantly regulates nonexpressive conduct—unlike, for example, statutes or ordinances that require permits for parading or leafletting on public streets—the requirement that administrative discretion be limited by specific standards should not apply in this case

ARGUMENT

Introduction

The Park District ordinance that petitioners attack, as unconstitutional on its face, is part of a comprehensive effort to manage a complex and intensively used system of urban parks—an exceptionally valuable but potentially fragile resource for people who live in the Chicago metropolitan area and for visitors from around the world. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289-90 (1984). The Park District regulates activities that pose a threat to the integrity of the parks, and to the ability of people to use

and enjoy the parks. Most of the regulated activities, by far, have little or nothing to do with expression. The activities for which petitioners sought permits—gathering in groups larger than fifty people, and amplifying sound—are regulated not because they involve expression (they do not, in fact, always involve expression) but because, if left unregulated, they would interfere with other individuals' use and enjoyment of the parks.

Petitioners' attack on the Park District's ordinance rests on a comparison of that ordinance to regulatory regimes like that found unconstitutional in *Freedman v. Maryland*, *supra*. See, *e.g.*, Pet. Br. 2, 12-13, 30-40. This comparison is, however, utterly wrongheaded. *Freedman* involved what the Court described as a "Maryland motion picture censorship statute" (380 U.S. at 52) that prohibited the exhibition of films unless they were licensed by the Maryland State Board of Censors. *Id.* at 52 n.1. See also *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743, 745 (2001). The Court ruled that this censorship scheme was constitutional only if Maryland provided certain procedural safeguards—procedural requirements that, according to petitioners, should be imposed on the Park District as well.

But the predicate of the Court's decision in *Freedman* was that "[t]he administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech." 380 U.S. at 57. The safeguards that the Court required were expressly "designed to obviate the dangers of a censorship system." *Id.* at 58. As the Court has repeatedly said, a ""licensing standard which gives an official authority to censor the content of speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like.'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 767 (1988), quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring); *Poulos v. New Hampshire*, 345 U.S. 395, 403 n. 9 (1953).

"Obviously the license required" by the Park District "is not the kind of prepublication license deemed a denial of liberty since the time of John Milton but a ministerial, police routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved." *Poulos*, 345 U.S. at 403. As the Court explained in *Cox v. New Hampshire*, 312 U.S. 569 (1941), regulations of this kind are often what make possible the exercise of First Amendment freedoms. "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public [property] has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." *Id.* at 574. Needless to say, petitioners, or any other group seeking to speak or demonstrate, may challenge, in state or federal court, any decision of the Park District on the ground that it is motivated by hostility to the view they are expressing. But petitioners' effort to apply to the Park District the procedural requirements that were designed for censorship schemes reflects a gross misapprehension of what is at stake.

Petitioners make three specific contentions. See Pet. Br. 12. First, they assert that, under this Court's decision in *Freedman v. Maryland*, the Park District is obligated to institute judicial proceedings, in order to sustain its own action, whenever it denies a permit. See Pet. Br. 33-40. Second, petitioners assert, again relying on *Freedman*, that the Park District ordinance is unconstitutional on its face because it does not specify a deadline by which a court reviewing the denial of a permit must act. See Pet. Br. 30-33. Third, petitioners claim that, under the ordinance, the Park District has "unbridled discretion" to deny a permit. See Pet. Br. 26-29, 40-44. As we demonstrate below, each of these claims is mistaken.

In addition to making these specific claims, petitioners insist that the Park District ordinance should be labeled a "prior restraint." See Pet. Br. 15-24. But in its foundational cases in this area, the Court avoided the term "prior restraint" in discussing content-neutral permit schemes designed "to assure the safety and convenience of the people in the use of" public property. *Cox*, 312 U.S. at 574; see *id.* at 578 ("The statute * * * is not aimed at any restraint of freedom of speech"); *Poulos*, 345 U.S. at 403. Rather, the Court explicitly treated content-neutral permit schemes as regulations of "time, place and manner." *Cox*, 312 U.S. at 576.[7]

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[7] Notably, the opinion of the Court in *Cox v. New Hampshire* was written by Chief Justice Hughes, the author of the Court's earlier opinion in *Near v. Minnesota*, 283 U.S. 697 (1931). *Near* was "the Supreme Court's first great encounter with prior restraint, and [is] * * * th[at] doctrine's leading precedent." John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L. J. 409, 414 (1983). Chief Justice Hughes's description of the permit statute in *Cox* as a "time, place, and manner" regulation that was not "a[] restraint of freedom of speech" (312 U.S. at 576, 578) reflected his, and the Court's, understanding that such a statute is entirely different from a true prior restraint, such as the content-based injunction declared unconstitutional in *Near*. See 283 U.S. at 713-20.

The Court has, on occasion, said that permit requirements constituted "prior restraints." See, *e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). But invariably the Court has said this only in discussing permitting schemes that provided "no articulated standards" (*id.* at 133) and left the decision whether to issue a permit to the administrators' "unbridled discretion" (*ibid.*). Thus these cases are best understood as standing for the proposition that, when the government is regulating expression, "a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a[n unconstitutional] prior restraint" (*City of Lakewood*, 486 U.S. at 757). As we demonstrate below, the Park District ordinance plainly does not confer "unbridled discretion." See Part III, *infra*. Indeed, the Park District ordinance is not even directed at expression. See pages 36-39, *infra*.

Similarly, the Court has explicitly stated that it will not apply "prior restraint analysis" even to an injunction directed at particular speakers, if the injunction is not based on "the content of * * * expression" but instead only "incidentally affect[s] expression" and leaves the speakers opportunities to express their views at other times and places. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 n.2 (1994); see also *Schenck v. Pro-Choice Network*, 519 U.S. 357, 374 n.6 (1997); *Hill v. Colorado*, 530 U.S. 703, 734 (2000) ("[O]ur concerns about 'prior restraints' relate to restrictions imposed by official censorship."). A decision by the Park District to deny a permit has all of these characteristics: it is not based on the content of the expression; it only incidentally affects expression, since the Park District's concern is not with the expressive character of any activity but rather with the impact of the activity on the parks; and a permit denial leaves the applicant free to speak in other places and at other times. It follows that the Park District ordinance is also not a "prior restraint."

In any event, the court of appeals was surely correct in its observation that petitioners' rhetorical claim that the Park District ordinance is a "prior restraint" does not advance the analysis of the issues in this case. Those issues—specifically, what procedures the First Amendment mandates for regulations like the Park District's—can be answered only by analyzing the nature of those regulations, not simply by insisting that the label of "prior restraint" applies to them.

I. THE FIRST AMENDMENT DOES NOT REQUIRE THE PARK DISTRICT TO INITIATE JUDICIAL PROCEEDINGS WHEN IT DENIES A PERMIT.

In *Freedman v. Maryland, supra*, this Court held that a state motion picture censorship scheme was constitutional only if the state provided certain procedural safeguards. As

elaborated in subsequent cases, *Freedman* requires, first, that there be "limits on the time within which the decisionmaker must issue the license" (*FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 226 (1990) (plurality opinion), citing *Freedman*, 380 U.S. at 59); second, that a government agency responsible for censoring speech must, if it does not license speech, "go to court to restrain [the speech]" and "[bear] the burden of proving that the [speech] is unprotected expression" (*Freedman*, 380 U.S. at 59, 58; *see FW/PBS*, 493 U.S. at 228, 230); and third, that the censorship and licensing scheme "must also assure a prompt final judicial decision" (*Freedman*, 380 U.S. at 59).

There is no issue in this case about the first of the *Freedman* requirements, that the license be granted or denied "within a specified brief period" (*Freedman*, 380 U.S. at 59).[8] See Pet. Br. 2 (invoking only the other *Freedman*

[8] The Park District ordinance specifies deadlines by which an administrative determination must be made: a permit application must be acted on within fourteen days (with a maximum possible extension of an additional fourteen days) or it will be deemed granted. Even if an application is incomplete at that point, it will, under the Park District ordinance, be deemed granted, conditional on completion. If a disappointed applicant seeks administrative review, that review must be concluded within seven days. As the court of appeals ruled, these deadlines are plainly reasonable, given the enormous volume of permit applications that the Park District must consider.

In addition, the uncontradicted evidence in the record is that the Park District responds to applications as quickly as it can. See 7/21/97 Tr. 34-35; R.62. The Park District accommodates requests on as little as one day's notice if the event does not require more planning or coordination with other departments. See R.123, ¶ 34; 7/21/97 Tr. 35; R.62. The Park District also has a policy of allowing "spontaneous" demonstrations (see Pet. App. 7a), and, as the Seventh Circuit noted in earlier proceedings in this case, "there is nothing in the record to indicate that the Park District has ever intervened to stop a First Amendment rally in one of its parks due to the absence of a permit." *MacDonald v. Chicago Park District*, 132 F.3d 355, 358 (7th Cir. 1997).

requirements). Petitioners do claim, however, that the Park District's ordinance is unconstitutional because it does not conform to the second *Freedman* requirement—that the government, rather than the applicant, be responsible for initiating judicial proceedings when a permit is denied (and, related, that the government bear the burden of proof in such an instance). See Pet. Br. 33-40. This contention is foreclosed by the Court's decision in *FW/PBS*, *supra*. But beyond that, this requirement, in the context of a regulatory scheme like the Park District's, is utterly unworkable.

A. *FW/PBS v. City of Dallas* Establishes That The Park District Is Not Required To Initiate Proceedings Reviewing A Permit Denial.

1. In *FW/PBS*, the Court considered a challenge to a Dallas, Texas, ordinance that required licenses for "sexually oriented businesses" (493 U.S. at 220 (plurality opinion))—that is, principally "businesses purveying sexually explicit speech" (*id.* at 224). Although there was no opinion of the Court, a majority of the Court concluded that the Dallas ordinance was unconstitutional because it failed to specify a deadline for action by the licensing authority. *Id.* at 226-27; see *id.* at 238 (Brennan, J., concurring in the judgment). But a majority of the Court also explicitly rejected the argument that the Dallas ordinance was unconstitutional because it did not require the licensing agency to initiate judicial proceedings when it denied a license: "[W]e conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *Id.* at 230 (plurality opinion); see *id.* at 244-48 (White, J., concurring in part and dissenting in part); *id.* at 250 (Scalia, J., concurring in part and dissenting in part).

The basis of the Court's holding in *FW/PBS* applies directly—indeed, *a fortiori*—to the Park District ordinance.

As the *FW/PBS* plurality explained, the Dallas "licensing scheme * * * is significantly different from the censorship scheme examined in *Freedman*" because "[i]n *Freedman*, the censor engaged in direct censorship of particular expressive material" and "such regulation of speech is presumptively invalid * * *". 493 U.S. at 229. By contrast, "[u]nder the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech." *Ibid.* Under the Park District ordinance, too, no government official passes judgment on the content of any expressive material.

In fact, the Park District ordinance presents much less of a danger to First Amendment values than even a licensing scheme like Dallas's. In *FW/PBS*, the licensing requirement, while applicable to some firms that did not engage in expressive activities, "largely target[ed] businesses purveying sexually explicit speech" (493 U.S. at 224 (plurality opinion)). The Park District ordinance does not in any sense target expressive activities. It targets activities that will affect the use of the parks. Most of those activities are unlikely to be expressive; only a few will, incidentally, be expressive in nature.

Further, the Dallas ordinance did not just target expressive activity; it targeted businesses engaging in expression with a certain content. The Dallas ordinance reflected a judgment, by a legislative body, that "sexually explicit" speech presented certain dangers and therefore had to be regulated. When a legislative body makes such a judgment, there is some reason for concern that the executive agency charged with implementing the judgment will be hostile to speech with the proscribed content. *Cf. Freedman*, 380 U.S. at 57 ("[T]he censor's business is to censor"). The Park District's regulatory regime does not rest on any remotely similar judgment about speech—not speech in general, and certainly not speech with a certain content. The Dallas ordinance was

far removed from the Maryland censorship scheme invalidated in *Freedman*, as the Court ruled in *FW/PBS*. The Park District's ordinance is much further removed still.

2. Petitioners attempt to distinguish *FW/PBS* on two grounds. First, petitioners say, *FW/PBS* involved sexually explicit speech that is, according to petitioners, of lower value than the political speech in which they engage. See Pet. Br. 36. But nothing in the reasoning of the majority in *FW/PBS* suggests that that decision rested on an assessment of the value of the speech involved. The Court assumed that the speech at stake was fully protected. See 493 U.S. at 224 (plurality opinion); *id.* at 245 (opinion of White, J.).[9]

Second, petitioners argue that they should not be required to institute judicial proceedings seeking review of a permit denial because they, unlike a movie exhibitor or a sexually-oriented business, do not stand to gain financially from obtaining a permit. See Pet. Br. 35, 39; see also *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F. 3d 761, 775-76 (11th Cir. 2000), petition for cert. filed, No. 00-1503. This argument rests on a misunderstanding of the basis of the *Freedman* requirements. The Court in *Freedman* was not addressing the general situation of parties who will not gain financially if their constitutional claims are vindicated—a situation that arises frequently, across the whole range of constitutional issues, not just in connection with censorship statutes.

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[9] Justice Scalia's opinion came closest to viewing the speech in question as lower value; he reasoned that businesses engaged predominantly in the sale of sexually-oriented material could be held to be engaged in the constitutionally unprotected activity of pandering, under *Ginzburg v. United States*, 383 U.S. 463 (1966). See 493 U.S. at 256-58 (Scalia, J., concurring in part and dissenting in part). No other Justice joined his opinion, however.

Rather, as its opinion makes clear, the *Freedman* Court was concerned with the particular circumstances of the motion picture industry at a time when that industry was subject to censorship laws in "only four States and a handful of municipalities" (380 U.S. at 59). In such circumstances, the Court explained, it was entirely possible that a local board's censorship of a film would not be challenged by either the exhibitor (who could show other films, approved by the censor) or the distributor (who could "freely exhibit his film in most of the rest of the country" (*ibid.*)). The real victims of unconstitutional censorship by a local censorship board would then be potential viewers who were denied an opportunity to see the censored film, and they would often have no realistic opportunity to challenge the Board of Censors' decision.

No comparable problem exists when permit applicants are denied a permit to conduct an event in the parks. Unlike potential viewers of a censored film, a disappointed permit applicant is immediately aware of the government's action and has a clear opportunity to challenge that action in court. Moreover, permit applicants like petitioners have the most direct interest in overturning the government's action; they are not in the position of relying on some other party to vindicate their rights. Thus the logic of *Freedman* is again simply inapplicable to a permitting regulation like the Park District's.

Petitioners treat *Freedman* as if it stands for the principle that the government must carry the burden of initiating litigation, and proving the absence of a constitutional violation, whenever a private party does not stand to gain financially from doing so. But that far-reaching principle has never been accepted as a matter of constitutional law. Many litigants claiming a deprivation of constitutional rights—not just those challenging a permit denial on First Amendment grounds—do not stand to gain financially if they succeed. Litigants raising claims under the Free Exercise Clause, the

Due Process Clause, the Equal Protection Clause, the Eighth Amendment, or a host of other constitutional provisions routinely do not stand to gain financially. There is a straightforward way to deal with this situation, and Congress has prescribed it, by authorizing the award of attorney's fees to prevailing parties in certain categories of litigation. See, *e.g.*, 42 U.S.C. 1988. Adopting a special procedural rule for First Amendment challenges to permit denials, as petitioners suggest, is not an appropriate response to this situation.

B. Requiring The Park District To Initiate Litigation Would Be Wholly Impractical.

Even apart from the Court's decision in *FW/PBS*, a requirement that the Park District initiate litigation to defend a permit denial would be utterly unworkable. The Park District considers thousands of permit applications each year. Often, because of the intense use of the parks, there will be conflicting requests for the same space. In such instances, the Park District must deny the application (although, in accordance with the specific dictates of its ordinance, the Park District offers the applicant an alternative time or place for its event (see Code § C. 5. d; J.A. 145)).

If petitioners' approach were to prevail, the Park District would have to file suit whenever it is unable to issue the requested permit, no matter how reasonable the grounds for its denial. This would impose an enormous burden on the Park District and on the courts—and, for that matter, an unwanted burden on permit applicants, many of whom presumably do not want to be named as defendants in litigation just because they sought a permit to hold an event in the parks.

The record of this case alone provides several examples of routine and reasonable permit denials that, under petitioners' approach, would require the Park District to initiate litigation. (The contrast with a censorship scheme—in which a denial of

permission can never be characterized as routine and is presumptively unreasonable (see, *e.g.*, *Freedman*, 380 U.S. at 57)—is again apparent.) On one occasion, MacDonald, petitioners' predecessor, sought to use sound amplifying equipment in Grant Park at a time when a band concert was scheduled nearby. 7/18/97 Fencik Dep. 24-26.[10] On another occasion, he applied to use a portion of Lincoln Park that, apparently unknown to him, had been converted into soccer fields. *Id.* at 16. And on another occasion, the irrigation system under a field that MacDonald had previously used for an event had been repaired, and large crowds would turn the grass into mud. *Id.* at 57-58. If petitioners were to prevail, the Park District would be required to bring suit whenever it denied a permit for reasons like these.

Not only would it be unworkable to impose such a requirement on the Park District; it would also serve no purpose, since, of course, the state and federal courts will entertain a claim by any applicant who believes that the Park District has acted wrongly, as we explain in more detail below. Permit applicants who believe they have been treated wrongly by the Park District would, therefore, gain little benefit from a requirement that the Park District initiate litigation against them. At the same time, the costs to the Park District and the courts would be substantial, perhaps crushing. The First Amendment does not require such a perverse result.

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[10] "7/18/97 Fencik Dep." refers to the deposition of Joan Fencik, General Counsel of the Chicago Park District.

II. THE FIRST AMENDMENT DOES NOT REQUIRE THAT A DEADLINE BE SPECIFIED IN ADVANCE FOR THE JUDICIAL RESOLUTION OF PROCEEDINGS CONTESTING THE DENIAL OF A PERMIT.

Under *Freedman*, a censorship "procedure must * * * assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." 380 U.S. at 59. Petitioners assert (Pet. Br. 30-33) that this requirement applies to the Park District's ordinance. This contention, too, misapprehends the meaning of *Freedman*.

A requirement that a regulatory regime specify a deadline for a judicial decision makes sense only when there is an independent requirement that the government initiate litigation to defend the denial of a license. The purpose of a deadline for judicial action is to ensure that the government, as plaintiff, will expedite the litigation. When the litigation is initiated by the permit applicant, the applicant is able to seek whatever expedition is needed—by means of an application for a temporary restraining order or a preliminary injunction, or by seeking another appropriate form of emergency relief. A hard-and-fast deadline for judicial action, specified in advance, is needed only when the government is in control of the litigation, and the speaker is entitled to remain passive. Since—as we have demonstrated—there is no requirement that the Park District initiate litigation to defend its permit denials, there should also be no requirement that a judicial deadline be specified in advance.

In addition, because the Park District's regulatory scheme is fundamentally different from a censorship regime like that involved in *Freedman*, a fixed deadline for judicial action is, again, wholly impractical. If a deadline were not met—and the Park District has no way to compel a court to meet the

deadline—the Park District would, under petitioners' approach, be required to issue a permit, even if the area of the park in issue were being used for a conflicting purpose, or the infrastructure of the parks would not withstand a particular use, or the permit allowed an obviously inappropriate use of the parks. The possibility of such irrational results shows that the *Freedman* approach is simply not appropriate for a regulatory scheme like the Park District's.

A. A Deadline For Judicial Action Is Appropriate Only When The Government Is Required To Initiate Litigation Seeking Review Of Its Own Decision.

1. The plurality opinion in *FW/PBS*, *supra*, concluded that while the government did not have to initiate litigation to defend a license denial, "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." 493 U.S at 228. See also *id.* at 230 ("[T]he availability of prompt judicial review" is sufficient to satisfy the First Amendment.). Some lower courts, like petitioners, view this language as requiring that a licensing scheme specify a deadline by which judicial proceedings reviewing a license denial must be completed. See, *e.g.*, *Baby Tam & Co. v. City of Las Vegas*, 154 F. 3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Blvd. v. Prince George's County*, 58 F. 3d 988, 999-1000 (4th Cir. 1995) (en banc).

This conclusion conflicts with the plain meaning of the plurality's language. In referring to the "possibility" and "availability" of prompt judicial review, the *FW/PBS* plurality was contemplating only that a plaintiff challenging a license denial would have available to it the familiar means by which a litigant may obtain prompt judicial action—a motion for an injunction pendente lite or some other form of emergency relief. Prompt judicial review is "available" and "possible" whenever a litigant may seek such relief.

Prompt judicial review would unquestionably be "available" to petitioners if they were to challenge the Park District's denial of a permit—as petitioner's predecessor demonstrated, by repeatedly seeking (although unsuccessfully, on the merits) preliminary injunctions. Indeed, petitioners would have a choice of forums, and could choose the one that best suited their purposes. A permit denial may, of course—as in this case—be challenged on constitutional grounds in federal court in a suit under 42 U.S.C. 1983. A plaintiff in federal court may seek a temporary restraining order and a preliminary injunction. Fed. R. Civ. P. 65. If a motion for preliminary injunction is denied, the plaintiff has an immediate appeal to the court of appeals. 28 U.S.C. 1292 (a)(1).

Alternatively, a party whose application for a permit is denied by the Park District may proceed in Illinois state court. Such a party can seek review by means of the common law writ of certiorari, which allows a trial court to review the administrative record and set aside any administrative decision that is not supported by substantial evidence or is arbitrary or capricious. See, *e.g.*, *Hanrahan v. Williams*, 174 Ill. 2d 268, 272-73, 673 N.E.2d 251, 253-54 (1996); *Stratton v. Wenona Community Unit Dist. No. 1*, 133 Ill. 2d 413, 427, 551 N.E. 2d 640, 645 (1990); *Holstein v. City of Chicago*, 29 F.3d 1145, 1148 (7th Cir. 1994) (describing common law certiorari as an "expansive remedy" that provides "extremely broad" review of all questions of law and fact, including de novo review of constitutional questions). If a request for declaratory or equitable relief is joined to the petition for a common law writ of certiorari, the plaintiff may introduce evidence not contained in the administrative record. See *Goodfriend v. Board of Appeals of Cook County*, 18 Ill. App. 3d 412, 420-21, 305 N.E.2d 404, 410 (1st Dist. 1973). A disappointed applicant may also bring an action under Section 1983 in state court and may join that claim to the request for a

common law writ of certiorari; this, again, would permit the court to consider evidence outside the administrative record. See, *e.g.*, *Stratton*, 133 Ill. 2d at 428-29, 551 N.E. 2d at 646-47. See also *Stykel v. City of Freeport*, 318 Ill. App. 3d 839, 742 N.E.2d 906 (2d Dist. 2001). In any of these proceedings, the state trial courts, under rules similar to the Federal Rules of Civil Procedure, may grant a temporary restraining order (see 735 ILCS 5/11-101) or a preliminary injunction (see 735 ILCS 5/11-102). See also 735 ILCS 5/11-106 (emergency relief on weekends and holidays).

Petitioners suggest (see, *e.g.*, Pet. Br. 23) that the common law writ of certiorari provides an inadequate means of reviewing permit denials, because the review is conducted on the administrative record. Petitioners are wrong about the adequacy of state procedures: disappointed applicants who want to introduce evidence in state court that is not in the administrative record can do so in the ways we have described, and of course they can also sue in federal court. More fundamentally, however, any inadequacies in state procedures do not entitle petitioners to relief in this case. If the Park District's ordinance is otherwise wholly sound, it should not be declared unconstitutional on its face—the relief petitioners seek—because of supposed deficiencies in the evidentiary rules governing state court proceedings. It would make no sense to say that, because of those supposed evidentiary deficiencies, the Park District is disabled from managing the parks.

The proper remedy for such deficiencies, if they exist, can be provided to a litigant who can show that those deficiencies have prejudiced it. The remedy should not be to grant relief to petitioners, who did not even invoke state court procedures, and who make no complaint about the federal court procedures that they did invoke. In other cases in which the Court has concluded that state procedures were constitutionally inadequate, the relief has been to require state courts

to provide adequate remedies to a party litigating in state courts—not to prevent the operation of a state or local regulatory program. See, *e.g.*, *Reich v. Collins*, 513 U.S. 106 (1994); *McKesson Corp. v. Division of ABT*, 496 U.S. 18 (1990); *Ward v. Love County*, 253 U.S. 17 (1920).

2. A requirement that there be a deadline for judicial action, specified in advance, is appropriate only if the government must initiate proceedings to review the denial of a license—something the Board of Censors was required to do in *Freedman* but that the Park District need not do, as we demonstrated above. The judicial deadline is a way of controlling the unusual litigation in which the government is seeking judicial review of its own decision and, as in *Freedman*, the private party affected by the government's decision is entitled to remain passive. The deadline ensures that the Board of Censors, or a comparable government entity, will do everything it can to expedite a case it has initiated. Without a deadline for judicial resolution, the government entity has no incentive to do so.

When a private party sues the government, however, there is no need for a deadline. That party can simply seek expedition in the particular case. If a plaintiff challenging the denial of a permit is unable to obtain prompt judicial relief, that will be because a court has decided, on the particular facts of the case before it, that prompt relief is not appropriate. The judicial deadline that petitioners seek will accomplish nothing except to take away from the courts the decision about whether, and to what degree, the particular litigation before them should be expedited. There is no reason systematically to distrust such decisions in cases reviewing the denial of a permit.

Petitioners' argument to the contrary is based on the mistaken idea that the judicial deadline requirement in *Freedman v. Maryland* is animated by a need to control the

courts. In fact, the judicial deadline requirement, like the other procedural safeguards mandated by *Freedman*, responds to the concern that is manifest in the *Freedman* opinion—a concern that the Board of Censors would be insufficiently solicitous of First Amendment rights. See 380 U.S. at 57-59. Nothing in the *Freedman* opinion suggests that this Court lacked confidence in the ability of the lower courts, including state courts, to adjudicate First Amendment claims. On the contrary, the basis of the *Freedman* approach is precisely that courts, not the Board of Censors, should make the final decision about whether speech will be censored. See *id.* at 58.

Courts are frequently in the position of having to decide whether emergency relief is required. That question can arise under many constitutional provisions, sometimes in cases with extremely high stakes. We routinely trust the courts, state and federal—here, it will be the court chosen by the party seeking relief—to adjudicate such requests in a reliable fashion. Where the applicant, not the government, is in control of the litigation, a hard-and-fast deadline, specified in advance, is a blunderbuss—an unnecessarily crude way of trying to accomplish what is routinely done, even in cases of the greatest importance, through case-by-case determinations by judges familiar with the particular facts and issues at hand.

B. A Fixed Judicial Deadline Would Require The Park District To Issue Permits In Unquestionably Inappropriate Circumstances.

One final aspect of *Freedman*'s judicial deadline requirement makes clear how unsuitable that requirement is for a regulatory scheme like the Park District's. The Park District, of course, cannot issue rules that control the dockets of courts reviewing its actions. Nor can it control whether courts meet a deadline. If there is a deadline for judicial resolution of a challenge to the Park District's action, and the courts fail to meet that deadline, all the Park District can do is issue the requested permit.

Thus the net effect of a judicial deadline is that permits will sometimes be issued even when the Park District has determined not to issue them and no court has overturned the Park District's decision. Under a censorship scheme like *Freedman*'s, such an outcome is not especially troublesome. Censorship schemes are "viewed with suspicion" (380 U.S. at 57), and a decision to censor a film is presumed unconstitutional (see *id.* at 58). The Court in *Freedman* emphasized the need to avoid de facto censorship that is not explicitly approved by a court. See *id.* at 59.

But under a permit regulation like the Park District's, it will often be irrational to grant a permit just because the courts have not acted quickly. The Park District might be in the position of granting permits for two conflicting uses of the same land; or of granting a permit that will cause the infrastructure of the park system to be overtaxed, or that will cause parkland to be used in a way that will detract from other legitimate uses, or that will impose unwarranted financial or logistical burdens on the park system. These outcomes—which, unlike the showing of a censored film, are uncontroversially undesirable and potentially destructive—would be the unavoidable result if a deadline for final judicial decision were missed. The potential irrationality of this result demonstrates that such a deadline, although a plausible way of controlling a censorship scheme, makes no sense when applied to the fundamentally different kind of regulation at issue here.

III. THE ORDINANCE DOES NOT VEST UNCONSTITUTIONALLY BROAD DISCRETION IN THE PARK DISTRICT.

Petitioners also contend that the Park District ordinance violates the First Amendment because it grants the Park District too much discretion over the decision whether to deny a permit. The relevant provision of the ordinance

(reproduced at App., *infra*) enumerates several specific grounds on which a permit may be denied—most of which are simply needed to make the permitting scheme workable. For example, the ordinance provides that an application may be rejected if it is not complete (Code § C. 5. e. (1)), if it contains material misrepresentations (*id.*, § C. 5. e. (3)), or if it seeks permission to engage in a prohibited activity (*id.*, § C. 5. e. (8)) or in an activity that conflicts with other authorized uses of the parks (*id.*, § C. 5. e. (7)). Any permitting scheme will have provisions like these.

A. The Park District Ordinance Allows Far Less Discretion Than Other Permit Regulations That This Court Has Approved.

It is unclear which particular ground for denial, listed in the ordinance, petitioners believe to allow excessive discretion; they assert broadly that "[v]agueness permeates the entire ordinance." Pet. Br. 28. In fact, the most conspicuous feature of the Park District ordinance is that it is much *more* specific than permit regulations that this Court has previously upheld. For example, in *Cox v. New Hampshire, supra*, the Court—upholding a state statute that prohibited any "parade or procession" on public streets without a license—ruled that the statute did not grant excessive discretion because the state supreme court required a license to be issued if "the convenience of the public in the use of the streets would not thereby be unduly disturbed." 312 U.S. at 576. This standard is far more discretionary than any of the standards set forth in the Park District ordinance.

Similarly, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court ruled that an ordinance requiring "the best sound for all events" and requiring that the event organizer "insure appropriate sound quality balanced with respect for nearby residential neighbors" did not give authorities

excessive discretion. *Id.* at 794.[11] None of the standards in the Park District's ordinance is nearly as open-ended. The local ordinance upheld in *Kovacs v. Cooper*, 336 U.S. 77 (1949), forbade "loud and raucous" sound amplification (*id.* at 79 (opinion of Reed, J.)); the Court has cited this standard as an example of a sufficiently specific limit on official discretion (see *Ward*, 491 U.S. at 794). This, too, is significantly more discretionary than anything in the Park District's ordinance.

In the closely related context of First Amendment challenges based on the alleged vagueness of laws prohibiting certain kinds of expression, the Court has upheld an ordinance that prohibited "actual or imminent interference with the 'peace or good order' of [a] school" (*Grayned v. City of Rockford*, 408 U.S. 104, 111-12 (1972)). The Court has also upheld a federal statute that allowed police to order demonstrators to disperse if the police reasonably believed that the demonstrators threatened to disrupt the "security or peace" of a foreign embassy. See *Boos v. Barry*, 485 U.S. 312, 330, 332 (1988). These, too, are less specific than the Park District's requirements.

No standard is self-interpreting; as the court of appeals cautioned, any provision in any permit scheme can be shown to allow some room for discretion. "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. Accordingly, this Court has made clear that it is permissible for standards to be "flexible" and for "the officials implementing them [to]

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[11] The municipal ordinance at issue in *Ward* did not require a license, but the Court held that the ordinance satisfied the requirement of limited discretion that is applicable to licensing ordinances. See 491 U.S. at 793-94 (concluding that the Court "need not decide" (*id.* at 794) whether the ordinance is subject to the same standards as "licensing schemes" (*id.* at 793) because the challenge to the ordinance would fail "on the merits" (*id.* at 794) even if those standards were applied).

exercise considerable discretion." *Ward*, 491 U.S. at 794. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ibid.* When compared to other standards that have come before the Court, the Park District's requirements are far more than adequately specific.

Petitioners never describe what degree of specificity they would require in a permitting scheme; as the court of appeals pointed out, that leaves them free to attack any standard that allows for the exercise of any judgment whatever, as, of course, every standard will. But this Court has explained the degree of specificity that is needed. In *City of Lakewood v. Plain Dealer Publishing Co., supra*, the Court identified the reasons for requiring clear standards (486 U.S. at 758):

> Standards provide the guideposts that * * * allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

See also *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). As the Court has said in a related context, the issue is whether the criteria that govern administrative action are "drawn so that a court would have [a] meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410-13 (1971).

The requirements set out in the Park District's ordinance are plainly specific enough to serve these purposes. They unquestionably give a court a "meaningful standard against which to judge the [Park District's] exercise of discretion."

The ordinance commits the Park District, ahead of time, to a limited list of reasons that can justify the denial of an application. If an application satisfies these straightforward and easily-met criteria—as, of course, thousands of applications do each year—the Park District will be unable to seize upon some other feature of the application and use that as a "*post hoc* rationalization[]" for denying an application. By any measure, therefore, the standards specified in the Park District ordinance meet this Court's requirements.[12]

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[12] *Amici curiae* Morality in Media, *et al.*, seek to raise the question (Br. 6-7) whether the Park District ordinance violates the First Amendment because it specifies that, "[t]o the extent permitted by law," the Park District "may deny an application for a permit if the applicant * * * has violated the terms of prior permits" (Code § C. 5. e; J.A. 145). While we agree with *amici* that the constitutionality of this provision is clear, we believe the question whether it is constitutional is not before the Court. The question whether this provision of the ordinance is too restrictive of speech—a question that would be determined under the standard for non-content-based restrictions set forth in such cases as *Ward v. Rock Against Racism*, 491 U.S. at 791—is not comprised within the questions presented in the petition, was not raised on appeal by petitioners or addressed by the court of appeals, and is not argued in petitioners' brief in this Court.

The Park District relied in part on this provision when it denied a permit to MacDonald. See J.A. 81-83. But MacDonald lost his "as applied" challenge to that permit denial in the district court and did not appeal. See note 6, *supra*. Petitioners are in agreement with us that the only questions before this Court pertain to the "facial" challenge. See Pet. Br. 2. In any event, MacDonald engaged in the demonstration even though he was denied a permit, and the Park District subsequently issued him permits; and petitioners, unlike MacDonald, do not allege that they have had a permit application rejected because of past violations. The resolution of an issue like this—about the reasonableness of a particular permit requirement—should plainly wait for a controversy over a specific permit denial, actual or threatened; it should not depend on hypothetical speculation about the kinds of cases to which this standard might apply. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998), quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) ("[W]e

B. The First Amendment Does Not Require That The Park District Deny All Non-Conforming Permit Applications.

Petitioners also assert that the Park District ordinance is insufficiently specific because it does not require the Park District to deny a permit to every application that fails to comply with the specified standards. Pet. Br. 28-29. This novel contention—that a permitting scheme is unconstitutional on its face unless it gives officials no leeway to forgive a violation of a standard—is wholly implausible. Not only does it ignore the practicalities of any permitting system; petitioners' position would, if accepted, do far more harm than good to First Amendment values.

The ordinance provides that the Park District "may deny" an application for the specified reasons. See Code § C. 5. e.;

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are reluctant * * * to invalidate legislation 'on the basis of its hypothetical application to situations not before the Court.'").

Although we believe the Court should not reach the question on the merits, the constitutionality of this provision is, in fact, clear. In *United States v. Albertini*, 472 U.S. 675 (1985), for example, the Court upheld the exclusion of a speaker from what the Court assumed was a public forum (see *id.* at 687)—an "open house" at a military base—because the speaker had, nine years earlier, received an order from the commander barring him from the base. Such an order did not require a predicate finding that the person in question had engaged in wrongful conduct. It follows that the Park District may decide not to grant a permit to someone who has engaged in specific wrongful conduct of a kind directly related to the integrity of the permitting scheme. In particular cases, it may be unreasonable—under state administrative law, the Due Process Clause, or possibly the First Amendment—to impose "a bar * * * of indefinite duration" for this reason, but as in *Albertini*, it is surely not "inherently unreasonable" (*id.* at 690) for the Park District to do so, and the question whether it is unreasonable in a particular case—again as in *Albertini*—can only be litigated when presented by specific facts. *Ibid.* See also *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 n.2 (1994) (an injunction issued "because of * * * prior unlawful conduct" is not a prior restraint).

App., *infra*, 1a. The Park District thus retains discretion to issue a permit to a non-complying application—a form of discretion comparable to the familiar prosecutorial discretion, or to an administrative agency's discretion not to bring an enforcement action. Needless to say, the First Amendment imposes limits on the Park District's exercise of this discretion; the Park District may not, for example, selectively waive non-compliance by speakers with whom it agrees, while enforcing the standards rigidly against those with whom it disagrees. Any individual who believes that the Park District has engaged in such a practice may challenge a permit denial on that ground, on an "as applied" basis. There is no showing in this case—indeed, as the court of appeals noted, none has even been attempted (Pet. App. 12a)—that the Park District has acted in such an improper fashion.

Rather, petitioners assert that, in order to reduce the likelihood that such selective non-enforcement will occur, a permit regulation is unconstitutional on its face unless it precludes all such discretion. This approach makes no sense. To begin with, even if such a rigid approach could be implemented—as we explain later, we doubt that it can—it would exact a steep price from First Amendment values. Many speakers whom the Park District now allows to speak would, under petitioners' approach, have to be denied a permit because of minor or technical errors in their application papers. This is particularly true of less well-organized applicants, who are especially likely to submit applications that are incomplete or untimely. It is difficult to see how the supposed gain in detecting improper selective enforcement would be great enough to justify the cost, to First Amendment values, of rigidly denying such applicants a permit for technical reasons.

In addition, petitioners' approach will discourage government agencies from adopting highly specific criteria, as the Park District did in this case, and instead give them an

incentive to use the most discretionary standards that the courts will allow. This, too, is a very undesirable effect, so far as the First Amendment is concerned. If, for example, the Park District had adopted the standard that this Court approved in *Cox v. New Hampshire*—whether "the convenience of the public in the use of the streets would * * * be unduly disturbed" (312 U.S. at 576)—it would have ample leeway to forgive minor breaches by permit holders. Any government agency will, quite reasonably, want to allow for the common-sense use of discretion that virtually every regulatory regime requires. Especially when the First Amendment is involved, it is surely better for such an agency to adopt more specific standards, while reserving the traditional discretion to decline enforcement—as the Park District did here—than to adopt more vague standards and exercise that discretion sub rosa.

Finally, as the comparison to prosecutorial discretion suggests, petitioners' approach would require not just the unforgiving enforcement of permit standards but the mandatory prosecution of every violation of a permit ordinance. It would be pointless to require a government agency to deny a permit to every non-conforming application if the agency could decline to prosecute those who proceeded without a valid permit. Indeed it would be worse than pointless, because it would encourage disorder and disregard for the law.

The Court has consistently resisted suggestions, in every context, that the Constitution requires the elimination of administrative discretion to decline to enforce regulatory requirements. On the contrary, the Court has emphasized the importance of maintaining such discretion, even in those areas where the Court is most alert to the risks of discriminatory enforcement. See, *e.g.*, *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987); *United States v. Armstrong*, 517 U.S. 456,

464-65 (1996). See also *Heckler v. Chaney*, 470 U.S. at 831 ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to the agency's absolute discretion.") And again, leaving aside the possibility of improper selective enforce-ment, the exercise of such discretion in the case of a permit scheme like the Park District's will *always* favor speech. The Park District has, for example, a policy—of which petitioners' predecessor MacDonald took advantage—of allowing spontaneous demonstrations. See Pet. App. 7a. It would hardly promote free speech to require the authorities to punish people for technically illegal demonstrations even when the authorities have concluded that those demonstrations do no harm.

C. Because The Park District Ordinance Is Not Directed At Expression, The Requirement That Licensing Standards Be Nondiscretionary Is Not Applicable.

Finally, there is some question whether the requirement that standards in a licensing regulation be nondiscretionary even applies to the Park District's ordinance. Local governments enforce many licensing laws—requiring business licenses, environmental regulation permits, building permits, and liquor licenses, for example—that might affect firms or individuals who are exercising rights protected by the First Amendment. The requirement of nondiscretionary standards obviously has never applied to licensing regulations like these. Rather, the Court has applied that requirement only to permitting schemes that are "directed narrowly and specifically at expression or conduct commonly associated with expression." *City of Lakewood*, 486 U.S at 760. Thus, for example, the Court has imposed this requirement when a government required a license for "distributing * * * literature of any kind" (*Lovell v. Griffin*, 303 U.S. 444, 447 (1938)); for "public worship" (*Kunz v. New York*, 340 U.S. 290, 290-91 & n. 1 (1951)); for any "parade or procession or other public demonstration" (*Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148 (1969)); or for "solicit[ing]" for members for a labor union (*Staub v. City of Baxley*, 355 U.S. 313, 316 n.1 (1958)) or on behalf of a religious cause (*Cantwell v. Connecticut*, 310 U.S. 296, 301-02 (1940)). See also *Schneider v. State*, 308 U.S. 147 (1939). All of these permit schemes were directed specifically at expressive activity.

The Park District ordinance is not directed at expression. It requires a permit before any one may conduct, in the parks, a wide variety of activities that are seldom, if ever, expressive: operating a vehicle; erecting a structure; using electronic equipment of certain kinds; landing a helicopter, balloon, or parachute; conducting a sporting event; riding a horse; or bringing in a non-domestic animal. Code § C. 3. a. (5), (7), (8), (11), (12), (13), (14); J.A. 134-35. Activities that are often expressive, like using amplified sound, or sometimes expressive, like conducing a large public gathering, are regulated only as part of a comprehensive regulatory scheme that is plainly not "directed narrowly and specifically at expression" (*City of Lakewood*, 486 U.S. at 760).

In this way, the Park District ordinance is more like an ordinance requiring, for example, a building permit or a business license. Such ordinances will, of course, sometimes be applied to entities, like media firms, that engage in expressive activities and that will not be able to do so as effectively if they do not get a permit—just as petitioners believed that their expression would be curtailed without a permit to assemble a large group and use sound amplification equipment. Any license requirement presents a risk of abuse when applied to entities engaged in expression. But those risks are dealt with on an as-applied basis, not by requiring

that the criteria for granting permits be spelled out with unusual specificity. The reason is that a regulation requiring a building permit or a business license is directed at a wide range of non-expressive activity. The same is true of the Park District's permit requirement.

The Park District ordinance also lacks other characteristics that have prompted the Court to require specific licensing standards. As we have said, the Park District ordinance is unlike the Dallas licensing ordinance involved in *FW/PBS*, *supra*, because the Dallas ordinance "largely target[ed] businesses purveying sexually explicit speech" (493 U.S. at 224 (plurality opinion)). That is, the ordinance targeted not just expression, but expression with a certain content. The Park District ordinance has neither characteristic.

The Park District ordinance is unlike the licensing ordinances invalidated in *City of Lakewood, supra*, and *Riley v. National Federation of the Blind*, 487 U.S. 781, 801-02 (1988), on which petitioners rely (*e.g.*, Pet. Br. 22) in at least two respects: the Park District ordinance does not target expression, and it does not require an individual "periodically [to] renew a license" (*City of Lakewood*, 486 U.S. at 759; see *Riley*, 487 U.S. at 801). The Court has emphasized that when a government agency requires "multiple or periodic licensing" (*City of Lakewood*, 486 U.S. at 759) it gives itself greater power to retaliate against speech it dislikes. *Id.* at 759-60; see *Riley*, 487 U.S. at 801. Individuals may choose to seek permits from the Park District on more than one occasion, but the Park District has not required renewals, and therefore has not put itself in the position that led the Court to require specific standards.

For all of these reasons, it is questionable whether the requirement that specific standards govern the issuance of a license should even be applicable to the Park District ordinance. Whatever the Court's conclusion on that point,

however, there is certainly no reason to apply that requirement with special rigor in a setting that presents such a limited threat to free expression. The Park District's standards—which go as far in the direction of specificity as anyone could reasonably require—are plainly enough to defeat petitioners' claim that the ordinance is unconstitutional on its face.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

From Chicago Park District Code, Chapter VII, Section C. 5.:

e. Contents of Notice: Grounds for Denial.

Notice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit. Where an application for permit has been denied because a fully executed prior application for the same time and place has been received, and a permit has been or will be granted to the prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area, the Park District shall propose an alternative place, if available for the same time, or an alternative time, if available for the same place.

To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:

(1) the application for permit (including any required attachments and submissions) is not fully completed and executed;

(2) the applicant has not tendered the required application fee with the application or has not tendered the required user fee, indemnification

agreement, insurance certificate, or security deposit within the times prescribed by the General Superintendent;

(3) the application for permit contains a material falsehood or misrepresentation;

(4) the applicant is legally incompetent to contract or to sue and be sued;

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part thereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;

(8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

(10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District

concerning the sale or offering for sale of any goods or services;

(11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent.

Oct. 1, 2001

(13)

Supreme Court, U.S.
FILED
OCT 1 2001
CLERK

No. 00-1249

In the

Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement was filed with the Petition for Writ of Certiorari, and remains current.

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ARGUMENT

By its silence, the Chicago Park District has apparently conceded one point made by Petitioners: that core political speech receives the most protection the First Amendment provides, and certainly as much protection as sexually explicit speech. The Park District argues, however, that unless a permit ordinance actually authorizes censorship, or contains unlawful discretion, the procedural safeguards in *Freedman v. Maryland*, 380 U.S. 51 (1965) are not necessary. Accordingly, claims the Park District, it is an unsuccessful permit applicant who must seek judicial review, and bear the burden of proof. The Park District also urges the Court to hold that prompt access to the courts satisfies *Freedman*, and that content-neutral permit ordinances are not prior restraints, but time, place and manner regulations. Those ordinances are presumed valid and the applicant must prove otherwise.

Were this Court to accept those arguments, persons espousing unpopular positions – especially positions contrary to politically sensitive government policies – would find it increasingly difficult to obtain use of the public fora.[1] Many speakers, denied permits to express unpopular ideas, would likely forego their rights rather than engage in protracted litigation. And since much political speech expressed at public rallies

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[1] Many examples of government efforts to suppress political speech are found in this Court's opinions. Without First Amendment protection, would Reverend Shuttlesworth been able to march through the streets of Birmingham? *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Without the First Amendment could Gregory Johnson burn his flag in Dallas? *Texas v. Johnson*, 491 U.S. 397 (1989). Could the American Nazi Party march through Skokie? *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). Each sought to engage in political speech strongly opposed by the government imposing a permit requirement, and by a large majority of the public as well.

is extremely topical, the simple act of denying a permit might well silence the speaker forever. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

I. THE PARK DISTRICT APPARENTLY AGREES THAT CORE POLITICAL SPEECH RECEIVES THE MAXIMUM AFFORDED BY THE FIRST AMENDMENT.

In the Park District's Brief, no response is made to Petitioners' argument that core political speech receives the maximum protection of the First Amendment.[2] The closest the Park District comes to supporting the Seventh Circuit's position that sexually explicit speech needs more protection than political speech is when it said:

> Petitioners attempt to distinguish *FW/PBS* on two grounds. First, petitioners say, *FW/PBS* involved sexually explicit speech that is, *according to petitioners*, of lower value than the political speech in which they engage. See Pet. Br. 36. But nothing in the reasoning of the majority in *FW/PBS* suggests that that decision rested on an assessment of the value of the speech involved. The Court assumed that the speech at stake was fully protected. See 493 U.S. at 224 (plurality opinion); *id.* at 245 (opinion of White, J.).[9]
>
> Respondent's Brief at 18 (emphasis added).

[2] The Park District is not alone in failing to defend the Seventh Circuit's position. Not a single *amicus* brief supports the panel's position. And Petitioners are aware of no case from any federal circuit court or district court that lends any support to what has to be viewed as the somewhat bizarre position of the Seventh Circuit panel.

In fn. 9, the Park District wrote:

> Justice Scalia's opinion came closest to viewing the speech in question as lower value; he reasoned that businesses engaged predominantly in the sale of sexually-oriented material could be held to be engaged in the constitutionally unprotected activity of pandering, under *Ginzburg v. United States*, 383 U.S. 463 (1966). See 493 U.S. at 256-58 (Scalia, J., concurring in part and dissenting in part). No other Justice joined his opinion, however.

Those few statements are hardly a ringing endorsement of the panel opinion on this point. With its silence the Park District apparently has joined the Petitioners and every *amici* in taking the position that core political speech is entitled to maximum protection under the First Amendment, and certainly deserves at least as much protection as the sexually explicit speech with which the Seventh Circuit panel was concerned.

II. PRIOR RESTRAINT ANALYSIS IS THE ONLY WAY TO PROTECT CORE POLITICAL SPEECH FROM UNCONSTITUTIONAL PERMIT RESTRICTIONS.

The Park District urges the Court to hold that unless a permit ordinance expressly authorizes the

government to base a permitting decision on the content of the proposed speech, or the ordinance contains unlawful discretion, the ordinance is not a prior restraint, but a time, place and manner regulation. Respondent's Brief, at 13, n. 7.

First, this Court has never taken the position urged upon it by the Park District.[3] The Park District extrapolates its position from several opinions of the Court, pointing to no opinion directly holding what the Seventh Circuit said. To the contrary, one of the cases cited by the Park District should be read as a rejection of the Park District's approach.

In *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1990) the Fifth Circuit held that a Dallas licensing ordinance aimed at sexually oriented businesses was a time, place and manner regulation, rejecting the claim of the businesses that it was a prior restraint on speech. This Court disagreed. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). The plurality opinion includes the following language (at 223):

> . . . Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at

[3] The closest the Court has come to such a limitation has been in cases presenting the monumental constitutional clash between a woman's right to privacy in abortion cases and the right of those opposed to abortion to protest the exercise of that right. See, e.g., *Hill v. Colorado*, 530 U.S. 703 (2000). But those cases do not involve censorship concerns, only a balancing of two important constitutional rights. In this case, the balance is between the right to engage in core political speech in a public forum and the right to play volleyball or have a picnic in a tranquil setting.

> secondary effects arising out of the sexually oriented businesses. Cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975).[4]

The Dallas ordinance was certainly content-neutral. Neither the Park District nor the Seventh Circuit disagree. The Park District concludes that because the Dallas ordinance contained unlawful discretion, it was a prior restraint, despite the fact that it did not expressly authorize censorship. But that is not what the opinion said. According to the opinion, the Court utilized a prior restraint analysis because the ordinance did not include *Freedman*'s procedural safeguards. From that statement, one must draw the conclusion that *any* permit ordinance restricting First Amendment rights must first comply with *Freedman*: it must be limited to a specified, brief period of time; it must provide prompt judicial review; and it must place the burdens of initiation and proof on the government. Only then does a reviewing court determine if it *also* meets the less rigorous test applied to time, place and manner restrictions.[5]

The Park District's approach to this case, and this permitting scheme, fails for a second reason. The Park

[4] Six Justices – three in the plurality and three in concurrence – used a prior restraint analysis.

[5] There is no other way to read the plurality opinion, which said the Court did not reach the time, place and manner issue because the ordinance did not satisfy *Freedman*. One must assume, then, that if the ordinance included *Freedman*'s procedural safeguards, the Court would next have determined if the ordinance was content-neutral, if it served a substantial governmental interest, and if it allowed reasonable alternative avenues for the expression. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). Obviously, a permit ordinance must satisfy both tests.

District readily admits that if an ordinance contains unlawful discretion, it is a prior restraint.[6] Well, this ordinance contains quite a bit of discretion, and it is generally unfettered.

The best place to look for a review of the discretion in the ordinance is Magistrate Judge Keys' Report and Recommendation, rejected by the District Court. App. to Pet. at 14a. Judge Keys meticulously focused on the language of the ordinance – as a reviewing court is required to do in prior restraint cases, given the presumption that the ordinance is unconstitutional. He found many ways the City could deny a permit for improper reasons. App. to Petition, at 32a - 42a. In addition to the many possibilities for discretion in the numerous bases for denial in the ordinance, its language contains the following:

> To the extent permitted by law, the Park District *may* deny an application for permit if the applicant or the person on whose behalf the application was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of an applicant. The Park District *may* also deny an application for permit on any of the following grounds . . . .

[6] This seems to be completely backwards. This Court's opinions tell us that if a permit is required to engage in First Amendment rights, *that* makes it a prior restraint. Then, if the restriction contains unlawful discretion, it is an *unlawful* prior restraint. The inclusion of discretion does not make it a prior restraint; it makes it unconstitutional.

> App. to Respondent's Brief, at 1a (emphasis added).

The Park District *may* deny a permit. It is not required to do so. It can obviously pick and choose who gets a permit after violating permit conditions in a previous rally, and who does not. And the Park District cannot point to any language in the ordinance limiting the discretion of the Park District in making this decision.[7] A rejected permit applicant must then challenge the denial in a lengthy and difficult appeal from the decision of an administrative agency, facing the monumental task of proving that the denial was because of the content of his proposed speech.[8] This Court said that is too much of a burden on the right to free speech:

> . . . [T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case

[7] The discretion is more onerous when one realizes that the Park District can hold the permittee responsible for rules violations regardless of who committed them.

[8] Given the presumption of correctness given a decision of an administrative agency, and the lack of a record under this ordinance, that task would be almost impossible to accomplish.

> whether the licensor is permitting favorable, and suppressing unfavorable, expression.
>
> *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 758 (1988)

If this Court finds that Judge Keys was right, and that the amount of discretion in the ordinance is excessive, the Park District must then acknowledge that *FW/PBS* applies here, and that the ordinance is a prior restraint.

III. EACH OF *FREEDMAN*'S PROCEDURAL SAFEGUARDS MUST ACCOMPANY A PRIOR RESTRAINT ON POLITICAL SPEECH.

If this ordinance is a prior restraint, there is no reason for limiting the applicability of *Freedman v. Maryland*. The approach of the Seventh Circuit is simply untenable. That Court would apply *Freedman* only to prior restraints that authorize censorship or that restrict sexually oriented businesses. That Court would elevate sexually explicit speech to a preferred position under the First Amendment because of the possibility that "state courts might drag their heels in deciding appeals by sexually oriented businesses from denials of licenses." App. to Petition, at 12a.

To the contrary, if *Freedman* applies to sexually explicit speech – as all agree it does – then core political speech in a traditional public forum deserves no less. After all, this is the very speech that we have historically "march[ed] our sons and daughters off to war to preserve." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976)(plurality opinion).

Therefore, the Chicago Park District ordinance must fail constitutional review because it lacks procedural safeguards (and, of course, because of its unfettered discretion). Those safeguards include the requirement for prompt judicial review.

IV. PROMPT JUDICIAL REVIEW MUST INCLUDE THE REQUIREMENT OF A PROMPT JUDICIAL DECISION.

As Petitioners pointed out in their Petition, the Seventh Circuit began this journey in *Graff v. City of Chicago*, 9 F.3rd 1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1984), when it decided that the plurality opinion in *FW/PBS* somehow modified the meaning of the phrase "prompt judicial review." Focusing in on a few trees rather than viewing the forest, the *Graff* plurality said that the *FW/PBS* opinion only required immediate access to a reviewing court when a permit is denied. The opinion below rests its holding on that determination of the plurality in *Graff*.[9]

This Court spoke very clearly in *Freedman*. It said that prompt judicial review must include a speedy judicial determination. And this Court did nothing in *FW/PBS* to weaken that requirement. The plurality opinion in *FW/PBS* said that prompt judicial review must be available. The Seventh Circuit and the Park District would say that mere access to the courts following a denial of a permit satisfies *Freedman*. But that is not what *Freedman* said, and that is certainly not what *FW/PBS* said. The *FW/PBS* plurality opinion said that under *Freedman*, "expeditious judicial review of that decision must be available." 493 U.S. 215, 227. *Expeditious* judicial review must be available, not simply

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[9] As noted in the Petition, each of the judges in this case were in the plurality in *Graff*.

judicial review. As the Ninth Circuit said in *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998), prompt access to a court, with no requirement of a speedy judicial decision, makes this procedural safeguard meaningless.

Of course, there is a sound judicial reason for rejecting the approach of the Seventh Circuit and the Park District. *This* Court can, of course, abandon *Freedman*, although there would seem to be no good reason for doing so. But if the concept of *stare decisis* is to have any vitality, an opinion of this Court cannot be overlooked or disregarded by a *lower* court unless this Court clearly says so. When a lower court can ignore an opinion of this Court by professing confusion about this Court's opinion – as the Seventh Circuit did in *Graff*, this Court's opinions cease to be the law of the land and, instead, become non-binding guides for lower courts. *FW/PBS* did not abandon or overrule *Freedman*'s requirement for a prompt judicial *decision*, and unless it does so, the Seventh Circuit is bound by that decision.

V. IMPRACTICALITY IS AN INSUFFICIENT REASON FOR ABANDONING THE FIRST AMENDMENT.

Finally, the Park District claims that it is simply impractical to require it to comply with the First Amendment as construed in *Freedman*. Respondent's Brief at 20-21. The Park District does not indicate why it would be more impractical for it to seek judicial review of its decision to deny a permit than it was for the State of Maryland to do the same, as *Freedman* required. One assumes that the Maryland censorship board reviewed quite a few films each year. It must have been very impractical for the State to seek judicial review each time it turned a permit down.

But the Park District's complaint of impracticality falls under its own evidence. The Park District has filed "Lodging Material" with its Brief. That document is a list of permit applications in the first eight months of 2001. That list includes more than 1,000 permit applications. It might well be impractical, and probably impossible, for the Park District to seek judicial review for each permit denied.

But the list is for permits *granted!*. There is no list of permits *denied*. It is reasonable to believe that there were not thousands of *them*. The Park District would only have to seek review if a permit application was denied, not if it was granted. This makes the impracticality argument a lot less persuasive.

But a second fact, deduced from the Lodging Material, eliminates the argument completely. The Lodging Material has 70 pages of permits. In that lengthy list, Petitioners can find *fourteen* permits with political speech considerations. The vast majority of permits were for picnics and sporting events. *Freedman* does not apply to picnics. The Park District granted those fourteen permits, including three for these Petitioners.[10] It would seem, then, that in the first eight months the Park District would not have had to file a single suit. Even if it had denied every political speech permit applied for, it would have had to seek judicial review fourteen times, less than two times a month. That isn't very impractical.

If a permit is denied because the park has already been reserved for someone else under a permit, or if the park simply will not accommodate the number of persons expected at the rally, judicial review is probably unnecessary. One can subjectively analyze each

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[10] The Park District has certainly developed a different attitude toward Petitioners' applications since this litigation began.

decision. But except for these limited situations, whenever a permitting authority denies a permit for core political speech in a public forum, it must meet its constitutional responsibility to protect political speech at all costs. Initiating judicial review does not seem too much of a burden in those cases.

CONCLUSION

The very life of core political speech is in danger. A government must never be allowed to decide who gets to speak in a public forum and who doesn't. The possibility that such speech can be suppressed is grounds for judicial intervention, for as this Court said:

> Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license.
>
> *FW/PBS*, 493 U.S. 215, 227.

The opinion of the Seventh Circuit must be rejected.

Respectfully submitted,

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AUG 22 2001

No. 00-1249

In the Supreme Court of the United States

CAREN CRONK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD, PETITIONERS

v.

CHICAGO PARK DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

A Chicago Park District ordinance requires a person to obtain a permit before conducting "events involving more than fifty individuals" in a municipal park. The ordinance specifies the grounds on which a permit application may be denied, none of which is based on the content of any expression that may be involved in the event. The questions presented are:

1. Whether the ordinance vests the permit-granting authority with too much discretion to satisfy First Amendment standards.

2. Whether, in order to satisfy the First Amendment, the ordinance must ensure that final judicial decision on the merits of an applicant's challenge to the denial of a permit will be rendered within a fixed deadline.

3. Whether, in order to satisfy the First Amendment, the ordinance must require the Park District to initiate a judicial proceeding to give effect to the administrative denial of a permit application, or whether instead it is sufficient that the applicant seek judicial review of the administrative permit denial.

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In the Supreme Court of the United States

No. 00-1249

CAREN CRONK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD, PETITIONERS

v.

CHICAGO PARK DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a municipal ordinance that requires individuals to obtain a permit before conducting large-scale events in public parks. Such events may include not only social gatherings and sporting events, but also expressive activities, such as rallies or demonstrations. Petitioners have raised several issues concerning the First Amendment requirements that apply to such an ordinance.

The National Park Service of the United States Department of the Interior is charged with promoting and regulating the use of the National Parks, some of which are sometimes used for special events and demonstrations, such as marching, picketing, religious services, and other activities protected under the First Amendment. 16 U.S.C. 1 (1994 & Supp. V 1999); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 289-290 (1984). The Park Service has

promulgated regulations under which permits are generally required for demonstrations and special events held in the National Capital Region. See 36 C.F.R. 7.96(g)(2)-(6). The regulations also set forth procedures for the application, extension, or revocation of a permit. 36 C.F.R. 7.96(g)(3), (4)(iii), (5)(iv) and (6). The regulations do not require a judicial decision on the merits before the denial of a permit takes effect.

The Forest Service of the Department of Agriculture also has promulgated regulations that require special-use permits governing non-commercial activity by groups of 75 or more on National Forest System land. 36 C.F.R. 251.50, 251.51, 251.54, 251.56, 251.60, 251.64. Those regulations are designed to "provid[e] a reasonable administrative system for allocating space among scheduled and existing uses and activities, address[] concerns of public health and safety, and control[] or prevent[] adverse impacts on forest resources." 60 Fed. Reg. 45,258 (1995). The United States therefore has a significant interest in the First Amendment requirements that apply to permit provisions such as the ordinance at issue in the present case.

STATEMENT

1. The Chicago Park District is responsible for operating hundreds of public parks and other public facilities in Chicago. See generally 70 Ill. Comp. Stat. Ann. 1505 (West 1993 & Supp. 2001). The Park District is authorized to "establish by ordinance all needful rules and regulations for the government and protection of parks * * * and other property under its jurisdiction." *Id.* § 7.02 (1993). One of the Park District's ordinances requires individuals to obtain a permit in order to "conduct * * * event[s] involving more than fifty individuals" on park property. Chicago Park Dist. Code, ch. VII, § C3a(1); Pet. App. 91a. This permit requirement applies both to events involving First Amendment

expression, such as "public assembl[ies]" and "parade[s]," and to events that do not involve any expressive activity, such as "picnics." *Ibid.* The ordinance also requires a permit for other activities that have the potential to interfere with the public use and enjoyment of the parks, such as "creat[ing] or emit[ting] any Amplified Sound" or "sell[ing] or offer[ing] for sale any goods or services." *Id.* §§ C3a(6), C3a(9); Pet. App. 92a.

The ordinance sets forth 13 grounds upon which the Park District may deny an application for a permit. Chicago Park Dist. Code § C5e; Pet. App. 5a, 97a-98a. A permit may be denied because, *inter alia*, another permit has been granted to an earlier applicant for the same time and place; the intended use would present an unreasonable danger to the health or safety of park users or Park District employees; the applicant has violated the terms of a prior permit; or the applicant has damaged park property on prior occasions and has not paid for the damage. *Ibid.*; see pp. 15-16, *infra*. None of the grounds for denying a permit application is based on the content of the expressive activity (if any) involved in the event at issue.

The Park District must decide whether to grant or deny a permit within 14 days of receipt of an application, subject to a provision for an extension up to an additional 14 days on written notice to the applicant. Pet. App. 10a, 43a. If the Park District denies an application, it must "clearly set forth" the grounds for such denial in writing and, "where feasible," it must propose "measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit." Chicago Park Dist. Code § C5e; Pet. App. 96a. An unsuccessful applicant has seven days to file a written appeal to the General Superintendent of the Park District. Chicago Park Dist. Code § C6a(1); Pet. App. 99a. The General Superintendent must issue a decision within

seven days from receipt of the appeal. Chicago Park Dist. Code § C6a(2); Pet. App. 99a.

If the General Superintendent affirms the denial, the applicant may seek judicial review in state court by common law certiorari. See Pet. App. 8a; *Norton* v. *Nicholson*, 543 N.E.2d 1053, 1059 (Ill. App. Ct. 1989), cert. denied, 496 U.S. 938 (1990). A proceeding for common law certiorari is heard in the same state court that reviews cases under the Illinois administrative procedure act, and "amounts to the usual substantial-evidence review that is familiar from administrative law." Pet. App. 8a-9a. Among their other powers, Illinois courts have "the inherent power to issue temporary restraining orders or preliminary injunctions," *Ardt* v. *Illinois Dep't of Prof'l Reg.*, 607 N.E.2d 1226, 1230 (Ill. 1992), and that authority is available in all cases, including common law certiorari cases. See, *e.g.*, *Washington* v. *Smith*, 618 N.E.2d 561 (Ill. App. Ct. 1993).

2. This suit presents a facial challenge under 42 U.S.C. 1983 to the constitutionality of the permit ordinance. The suit was originally brought by Robert MacDonald, an advocate of marijuana legalization who sought to hold rallies in Chicago parks. MacDonald died during the course of the litigation, and petitioners Cáren Cronk Thomas and the Windy City Hemp Development Board were substituted as plaintiffs.

In March 1997, McDonald applied for a permit for an event in May of that year, but the Park District denied the application based on, *inter alia*, multiple violations of permits for events held in August 1996. Pet. App. 18a; J.A. 77-78, 81-83. McDonald then brought this action in federal district court. On May 23, 1997, he sought a preliminary injunction against enforcement of the Park District's permit ordinance, and an order allowing him to hold a rally in August 1997. Pet. App. 20a. MacDonald alleged that the permit ordinance was facially unconstitutional because it gave Park District officials

unfettered discretion to deny permits. The district court enjoined the Park District from enforcing certain provisions of its ordinance, but the Seventh Circuit reversed. See *MacDonald* v. *Chicago Park Dist.*, 132 F.3d 355, 356 (1997). The court ruled that "both the balance of harms and the public interest weigh decidedly in the Park District's favor" and that MacDonald had not demonstrated a strong likelihood of success on the merits. *Id.* at 361-362.

On January 2, 1998, MacDonald applied for a permit to hold another rally on May 9-10, 1998. Pet. App. 22a. The Park District denied his application on January 15, 1998, on the ground that the locations MacDonald requested were not available on those dates. See *ibid.* MacDonald did not appeal the denial to the General Superintendent. *Ibid.* Instead, MacDonald sought an injunction in federal district court to compel the Park District to issue a permit. *Id.* at 21a. MacDonald again alleged, *inter alia*, that the ordinance is unconstitutional because it grants unbridled discretion to Park District officials, see *id.* at 78a-82a, and because it does not ensure a prompt judicial decision on the merits of a permit denial and does not require the Park District to initiate judicial proceedings to effect permit denials, see *id.* at 32a, 45a-48a. The district court rejected MacDonald's claims and granted summary judgment to the Park District. *Id.* at 75a-89a.

3. The Seventh Circuit affirmed the district court's decision. Pet. App. 1a-12a.

At the outset, the court explained that petitioners were asserting a facial challenge to the Park District's permit ordinance. Pet. App. 2a. The court characterized as "not * * * a helpful formula" petitioners' claim that the ordinance must "be free of any element of vagueness or uncertainty that might enable [it] to be enforced in such a way as to deter or impede" protected speech because it is a "prior restraint." *Id.* at 2a-3a. The court noted that the Park

District's ordinance does not pose the risks of a censorship scheme because it "does not authorize any judgment about the content of any speeches or other expressive activity." *Id.* at 3a. The Court noted as well that it "is not even clear" that the permit requirement reduces speech, since allowing unregulated access to city parks "could easily reduce rather than enlarge the park's utility as a forum for speech." *Ibid.* At the same time, the court acknowledged that "[t]here is * * * a danger in giving officials broad discretion over which political rallies shall be permitted to be conducted on public property, because they will be tempted to exercise that discretion in favor of their political friends and against their political enemies." *Id.* at 4a. The existence of those competing interests, the court observed, must "give pause to any court minded to strike down a permit regulation on its face." *Ibid.*

The court then turned to the merits of petitioners' facial challenge. First, the court rejected as frivolous petitioners' claim that one of the ordinance's grounds for denying a permit—that the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of any event or activity previously permitted"—is too vague. Pet. App. 5a (quoting Chicago Park Dist. Code § C5e). The court noted that "material" is "one of the elemental legal terms, and is considered quite definite enough to form the keystone of criminal prohibitions against fraud." *Ibid.* The court also rejected petitioners' contention that the ordinance grants too much discretion to the Park District, because it provides that the Park District "may" deny permits on the specified grounds, but does not require it to do so. *Id.* at 6a. The court reasoned that if the Park District were required to reject a permit on the stated grounds, "the regulation would be more restrictive than it is." *Ibid.*

Finally, the court rejected petitioners' claims relating to the sufficiency of state procedures for judicial review of permit denials. Relying on *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), the court held that the requirement in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), that the government seek judicial review of its own action is limited to laws that allow government officials to engage in censorship through content-based determinations. Pet. App. 9a. The court also rejected petitioners' claim "that the required expedition at the administrative level will be undone by foot dragging at the state court level." *Id.* at 10a. The court explained that "[s]ince 42 U.S.C. § 1983, the statute under which federal constitutional claims are litigated in the federal courts, does not impose any requirement * * * of exhausting state judicial remedies, the victim of foot dragging in state court can always bring a parallel suit in federal court, complaining that the delay is denying him an adequate remedy for the violation of his constitutional rights." *Id.* at 11a.

The court distinguished other circuits' holdings that imposed a requirement of prompt judicial decision after the denial of a permit, on the ground that those cases involved permit schemes aimed at adult-oriented businesses. Pet. App. 11a. In those cases, the court explained, the "government's evident concern with the content of the 'speech' disseminated by such businesses argues for greater judicial vigilance than in time, place, and manner cases." *Ibid.* By contrast, the "permit requirement at issue here is far more general and so far as appears the permits that are denied do not relate to controversial or unpopular expression." *Id.* at 12a.

SUMMARY OF ARGUMENT

I. Contrary to petitioners' claim, this case does not present the question whether a court should entertain a facial First Amendment challenge to the Park District ordinance. The court of appeals in fact entertained petitioners' facial

challenge in this case and adjudicated it on its merits. In any event, *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 126 (1992), held that a facial challenge could be brought to a non-content-based licensing ordinance that, like the one in this case, was broadly applicable to speech and non-speech activities in a traditional public forum. That holding is controlling here.

II. The court of appeals correctly held that the Park District ordinance is not a "prior restraint" that is similar to the censorship regime in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and that it therefore is not subject to the stringent substantive and procedural requirements of content-based prior restraints. Unlike a content-based censorship scheme, the Park District ordinance permits denial of a license only on grounds unrelated to the content of any expressive activity. Moreover, unlike a content-based censorship scheme, the Park District ordinance does not single out expressive activities for regulation, but applies equally to all park activities involving large groups.

That does not mean that the First Amendment is inapplicable to the Park District ordinance. Because the ordinance may have the effect of imposing a limit on speech in a public forum, it must not leave officials with unfettered discretion to deny permits and thereby restrict speech on impermissible grounds. The ordinance satisfies that standard. It allows officials to deny permits only on certain simple, clearly stated grounds, and any applicant who satisfies the stated conditions must be granted a permit.

The fact that the ordinance vests some discretion in officials to grant permits despite *de minimis* or technical violations does not violate the First Amendment. Without such discretion, the ordinance would be more—not less—restrictive of speech. Moreover, state administrative law imposes restrictions on the Park District's discretion. It would violate state law for the Park District to exercise its

discretion arbitrarily, granting a permit to one applicant despite a minor violation while denying a permit to a similarly situated applicant because of the same violation.

III. The court of appeals also correctly held that the availability of judicial review of permit denials under the Park District ordinance, including the availability of prompt temporary or preliminary relief, satisfies First Amendment procedural standards. Under *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), an ordinance that requires the licensing of sexually oriented businesses need only provide for the availability of prompt judicial review of a challenge to a permit denial and need not provide that the licensing authority must itself initiate a judicial proceeding to render the denial legally enforceable. Those same conclusions apply *a fortiori* here. As noted above, like in *FW/PBS*—and unlike in *Freedman*, where stricter standards of judicial review were required—the Park District ordinance does not allow authorities to deny a permit based on the content of the speech for which the permit is sought. Indeed, the Park District ordinance is not only content-neutral, as in *FW/PBS*, but also speech-neutral, since it applies equally to non-expressive as well as expressive activities.

The constitutionality of the procedures for judicial review here is supported by *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953), in which this Court held that ordinary judicial review proceedings were sufficient under the First Amendment in a case involving a challenge to a license denial under an ordinance similar to the one in this case. Although some form of expeditious relief, such as temporary or preliminary injunctive relief, presumably must be available in appropriate cases to protect First Amendment interests, imposing strict time limits for a final judicial decision in all permit denial cases is unnecessary and would impose significant costs on the court system and other litigants. Nor is there any justification, in the context of a content-neutral permit

requirement like the one here, to take the extraordinary step of requiring the Park District to initiate judicial review of its own denials of permit applications.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY ENTERTAINED PETITIONERS' FACIAL CHALLENGE TO THE PARK DISTRICT ORDINANCE

Petitioners claim (Br. 12) that the court of appeals "decreed that facial challenges should not be entertained in First Amendment cases without proof that the law has been applied in an unconstitutional manner." The court of appeals did not hold or state that facial challenges may not be heard. To the contrary, the court entertained petitioners' facial challenge, although the court ultimately rejected it on its merits. Indeed, respondent did not argue below that petitioners may not bring a facial challenge, and respondent does not advance that argument in this Court. See Br. in Opp. 7 ("The Seventh Circuit did not hold, and Respondent has never argued, that a facial challenge is unavailable or inappropriate to Petitioners here."). Accordingly, this case does not present the question whether a facial challenge to an ordinance such as this may be entertained.

In any event, in *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 126 (1992), this Court held that a facial challenge may be brought in a similar context. The ordinance in *Forsyth County* required permits to be obtained "for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes." Like the ordinance in this case, the ordinance in *Forsyth County* was not limited to expressive activity, but was applicable to "any activity on public property," regardless of whether the activity involved protected expression. *Id.* at

131.[1] That feature suggests a generality of purpose and application that would tend to mitigate First Amendment concerns. See *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 760-761 (1988). On the other hand, the ordinance in *Forsyth County*, also like the ordinance in this case, required a permit "before authorizing public speaking, parades, or assemblies in 'the archetype of a traditional public forum.'" 505 U.S. at 130 (quoting *Frisby* v. *Schultz*, 487 U.S. 474, 480 (1988)). Public streets and parks are "quintessential public forums," and the use of such forums "for purposes of assembly, communicating thoughts between citizens, and discussing public questions" has traditionally enjoyed special solicitude under the First Amendment. *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939)). Accordingly, the Court held in *Forsyth County* that a facial challenge may be entertained. 505 U.S. at 129. That holding is controlling in this case.

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[1] Similarly, the National Park Service's regulations for National Capital Region parks impose permit requirements on both "demonstrations" and "special events," see 36 C.F.R. 7.96(g)(2), both of which are defined as events "the conduct of which has the effect, intent or propensity to draw a crowd or onlookers." 36 C.F.R. 7.96(g)(1)(i) and (ii), and (2). The term "demonstrations" includes "demonstrations, picketing, speechmaking, marching, holding vigils or religious services and all other forms of conduct which involve the communication or expression of views or grievances." 36 C.F.R. 7.96(g)(1)(i). The term "special events" includes "sports events, pageants, celebrations, historical reenactments, regattas, entertainments, exhibitions, parades, fairs, festivals and similar events" that are not "demonstrations." 36 C.F.R. 7.96(g)(1)(ii). The major differences between the rules applicable to the two categories are that some demonstrations may be held without a permit, whereas all special events require permits, see 36 C.F.R. 7.96(g)(2)(i) and (ii), and demonstrations are permitted in some areas in which special events are not, see 36 C.F.R. 7.96(g)(3)(i). See also 36 C.F.R. 251.50, 251.51 ("special use" permits required for National Forest Service lands).

Although the court of appeals entertained petitioners' facial challenge, the court did advert to the limitations inherent in such a challenge when the ordinance under attack is content-neutral (indeed, speech-neutral). The court noted the "competing interests" at stake in a case such as this, since "[a] park is a limited space, and to allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech" when competing users attempt to use the same part of the park. In the court's view, such considerations "must give pause to any court minded to strike down a permit regulation on its face and so without consideration of its application to a particular event for which a permit was denied." Pet. App. 3a-4a. The court of appeals was correct that those considerations may properly inform the analysis in a case such as this. But the court was also correct in reaching the merits of petitioners' facial challenge, and as we explain below, it was correct in rejecting that challenge.

II. THE PARK DISTRICT ORDINANCE DOES NOT VEST ADMINISTRATIVE OFFICIALS WITH UNCONSTITUTIONAL LICENSING DISCRETION

A. The Park District Ordinance Is Not The Kind Of Content-Based "Prior Restraint" That Is Presumptively Unconstitutional

Petitioners argue (Br. 15-24) that the Park District's permit ordinance is a species of "prior restraint" and, as such, should be regarded as presumptively unconstitutional under the First Amendment. Petitioners ask the Court to equate the kind of content-neutral permitting requirement involved in this case with censorship systems under which the government requires individuals to obtain licenses before they may engage in certain types of speech at all—at any place and at any time—and bases the availability of a

license on the content of the speech. See, *e.g.*, *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

The permitting ordinance in this case is not presumptively unconstitutional and does not come before the Court with the heavy burden of justification that such "prior restraints" based on censorship schemes must satisfy. See Pet. App. 2a-4a. Petitioners want to use particular places (public parks) at particular times to engage in expressive activity. The use of public parks, however, gives rise to problems that are unrelated to the content or existence of any expressive activity, such as excessive crowding, damage to property, competing and inconsistent attempts to use the same area, and threats to public safety. Unlike a censorship scheme, the Park District ordinance employs permitting criteria that are not based on the content of the speech (if any) involved in the proposed activity, but instead are based on non-communicative concerns such as avoiding scheduling conflicts, ensuring traffic flow, and protecting public safety and park property. See pp. 15-16, *infra*. Moreover, the ordinance does not single out expressive activities for regulation, but instead applies equally to all park activities involving large groups, regardless of whether they involve protected expressive activity (such as rallies and marches) or non-protected, non-expressive activities (such as athletic contests and picnics).

Those features render the Park District's ordinance far less "fraught with danger" to First Amendment interests, *Freedman*, 380 U.S. at 57, than content-based censorship schemes. While governmental regulation of the content of speech in a public forum is subject to the most searching First Amendment review, this Court has long recognized that governments have greater latitude to regulate the use of public forums for the purpose of addressing non-content-related problems. See, *e.g.*, *Perry Educ. Ass'n*, 460 U.S. at

45; *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 761 (1995). Such latitude applies in this case.

B. The Park District Ordinance Contains Reasonably Definite, Content-Neutral Standards For The Denial Of A Permit

The court of appeals correctly held that the criteria for permit denial in the Park District ordinance provide definite, content-neutral standards that satisfy the First Amendment because they do not vest an impermissible degree of discretion in licensing officials. See Pet. App. 4a-6a.

1. Although the Park District ordinance is not a censorship scheme, it is subject to First Amendment scrutiny. Even when, as in this case, such an ordinance is intended to deal solely with non-content-based concerns, it is conceivable that an official could attempt in a particular case to invoke the ordinance to prevent disfavored speech in the traditional public forum of a public park. See Pet. App. 4a. The more broadly the permit system vests the official with discretion over the licensing decision, the greater the risk that the system may be misused for content-based decisionmaking that is impermissible in a traditional public forum. Thus, to satisfy the First Amendment, an ordinance that requires an individual to obtain a permit prior to engaging in expressive activity in a park or other traditional public forum must cabin administrative discretion by providing reasonably definite content-neutral standards upon which government officials must base their decisions whether to grant a permit. See *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951) ("narrowly drawn, reasonable and definite standards for the officials to follow").[2]

[2] In addition, such permit systems must satisfy the traditional time, place and manner test, under which a permit requirement "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Forsyth County*, 505 U.S. at 130. Petitioners do not allege that the Park District's permit scheme fails to satisfy this test.

The risks to speech are substantially less than in the censorship context, however, and "perfect clarity and precise guidance" in the language of the standards is not required. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989). Instead, it is enough that the ordinance contain "neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood*, 486 U.S. at 760. Government officials must be allowed some degree of discretion in furthering the legitimate public interest in regulating the scheduling of, for example, rallies and parades in a manner that is consistent with public safety, the preservation of park land and property, and the management of pedestrian and vehicle traffic.

2. None of the ordinance's criteria for denial of a permit is based on the content of the speech at issue. The Park District may deny a permit only on one or more of the following grounds: (1) the applicant has filed an incomplete application; (2) the applicant has failed to pay required fees or to provide proof of insurance; (3) there is "a material falsehood or misrepresentation" in the application; (4) the applicant "is legally incompetent to contract or to sue or to be sued"; (5) the applicant has damaged Park District property in the past or has other unpaid debts to the Park District; (6) a prior applicant has already received or will receive a permit for the same time and place; (7) the proposed activity will conflict with previously-planned Park District programs; (8) the proposed activity is "prohibited by or inconsistent with" the classifications or uses of the park; (9) the proposed activity would "present an unreasonable danger to * * * health or safety"; (10) the applicant has not complied with Park District regulations regarding the sale of goods or services; (11) the proposed activity is illegal;

(12) the applicant has not obtained the required insurance; or (13) the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of an event" or has violated the terms of prior permits. Pet. App. 97a-99a.

Those are the only grounds on which a permit may be denied. They are objective and reasonable, and none of them turns on the content—or even the existence—of any expressive activity involved in the function for which the permit may be sought.[3] Those grounds for denial of a license therefore serve reasonably to "insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood*, 486 U.S. at 760. Furthermore, the ordinance requires the Park District, in its notice of denial of an application for a permit, to "clearly set forth the grounds upon which the permit was denied." Chicago Park Dist. Code § C5e; Pet. App. 96a. The requirement that the agency state its reasons, under an ordinance that itself contains reasonably narrow, objective, and definite grounds for denying a permit and provides for an appeal to the General Superintendent, furnishes additional protection against arbitrary treatment. Compare *Forsyth County*, 505 U.S. at 133 (noting that there are "no articulated standards" in the ordinance, that "the administrator is not required to rely on objective factors," that the administrator "need not provide any explanation for his decision," and that his decision is "unreviewable"); *Dunlop* v. *Bachowski*, 421 U.S. 560, 572 (1975) (statement of reasons "promotes thought by the Secretary and compels him to cover the relevent points and eschew irrelevancies"); Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1292 (1975) (the "necessity for justification" is "a powerful preventive for wrong decisions").

[3] National Park Service permit regulations for the National Capital Region parks provide that permits "may be denied" if (a) a prior permit application has been received that "has been or will be granted authorizing activities which do not reasonably permit multiple occupancy of the particular area"; (b) "[i]t reasonably appears that the proposed demonstration or special event will present a clear and present danger to the public safety, good order, or health"; (c) "[t]he proposed demonstration or special event is of such a nature or duration that it cannot reasonably be accommodated in the particular area applied for"; or (d) "[t]he application proposes activities contrary to any" applicable laws or regulations. 36 C.F.R. 7.96(g)(4)(iii). In determining whether to approve a "special event" (see note 1, *supra*), the National Park Service also considers criteria listed at 36 C.F.R. 7.96(g)(5)(vi), including whether the objectives of the event are within the basic mission of the Service's National Capital Region; whether the area required is reasonably suited in terms of accessibility, size, and nature of the proposed event; whether it can be accommodated within a reasonable allocation of Park Service funds; and whether the event is duplicative of others in the region. See also 36 C.F.R. 251.54(e)(1) and (5) (criteria for screening "special use" permits for National Forest Service land).

3. Petitioners nonetheless claim (Br. 28-29) that "denial [of a permit application] is completely discretionary," because the ordinance provides that the Park District "may" (rather than "must") deny permits on the specified grounds. That modest degree of discretion does not render the ordinance facially unconstitutional.

a. Initially, petitioners err in stating (Br. 28) that a permit denial "is completely discretionary." To the contrary, the ordinance provides officials with no discretion to deny a permit for reasons other than those specified in the ordinance. Most speakers or other users of the park can be expected to satisfy each of the straightforward and sensible criteria in the ordinance. In all such cases, the ordinance mandates that the permit be granted and provides officials with no discretion whatsoever.[4]

[4] When this Court has invalidated a licensing scheme on its face on the ground that it granted too much discretion to administrators, the Court has generally done so when the scheme placed *no* limits on the officials'

In addition, as the Seventh Circuit explained, in the absence of the term "may" in the ordinance, the Park District would be compelled to reject a permit if one of the specified grounds was present, regardless of whether there were also mitigating circumstances in a particular case. In that event, "the regulation would be more restrictive [of speech] than it is." Pet. App. 6a. The permitting scheme governs a very broad range of activities, both expressive and non-expressive. The existence of some degree of discretion permits Park District officials to issue permits in spite of *de minimis* or technical violations that would otherwise trigger automatic denial.

Moreover, as a matter of state law, the Park District, like any other administrative body, may not make decisions that are arbitrary or capricious or otherwise irrational. See *Hanrahan* v. *Williams*, 673 N.E.2d 251, 253-254 (Ill. 1996) ("The standards of review under a common law writ of *certiorari* are essentially the same as those under the Administrative Review Law. Under the Administrative Review Law, courts generally do not interfere with an agency's discretionary authority unless the exercise of that discretion is arbitrary and capricious * * * or the agency action is against the manifest weight of the evidence.") (citations omitted), cert. denied, 522 U.S. 812 (1997). If the Park District treats two identically situated applicants differently—

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discretion. See, *e.g.*, *Forsyth County*, 505 U.S. at 133 ("[t]he decision how much to charge * * * —or even whether to charge at all—is left to the whim of the administrator"); *City of Lakewood*, 486 U.S. at 769 ("the face of the ordinance itself contains no explicit limits on the mayor's discretion"); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150 (1969) (officials "were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience,'" and the ordinance thus "conferred upon the City Commission virtually unbridled and absolute power to prohibit" parades, processions or demonstrations on city streets).

say, by denying a permit for a technical violation in one case while overlooking that same violation and granting the permit in another case—the District would thereby be violating settled state administrative law. Accordingly, state law itself imposes limitations on the modest discretion introduced into the scheme by the word "may."

Finally, even if the term "may" were replaced by "must" in the Park District ordinance, the government would still retain the ultimate discretion not to prosecute individuals who engage in covered activities without permits. See generally *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). Petitioners have never argued that prosecutorial discretion of that sort violates the First Amendment; to the contrary, petitioners themselves have been its beneficiaries. See Pet. App. 17a ("[E]ven though Mr. MacDonald had no permit for May 10 and 11, 1997, the Park District did not stop his rally and, in fact, helped him to plan for it."). So long as the government retains the discretion not to prosecute some individuals who engage in licensed activities without permits, the use of the word "may" in the ordinance adds little additional discretion; like prosecutorial discretion, it simply authorizes the Park District to allow individuals who would not, strictly speaking, qualify for a license to engage in the activities anyway.

b. In these circumstances, the court of appeals was correct in holding that First Amendment interests are adequately vindicated through the specification of non-content-based grounds for denial of a permit and the availability of an "as applied" challenge, in which an unsuccessful applicant would have the opportunity to show that the Park District acted unlawfully or arbitrarily in denying a permit—*e.g.*, because it has granted licenses to other similarly situated applicants based on the content of their speech or the absence of any protected expressive activity. See Pet. App. 10a. Such a challenge would allow those who seek to engage

in expressive conduct to ensure that the residual discretion left to the Park District under the ordinance is not used in a way that violates the First Amendment, while allowing the Park District to operate a practical licensing scheme that ultimately protects those who use the parks for a variety of both expressive and non-expressive activities.[5]

III. A CONTENT-NEUTRAL PERMIT ORDINANCE NEED NOT PROVIDE A STRICT DEADLINE FOR JUDICIAL DECISION ON THE MERITS OF A PERMIT DENIAL OR REQUIRE THE GOVERNMENT TO BEAR THE BURDEN OF SEEKING JUDICIAL REVIEW TO EFFECT THE DENIAL OF A PERMIT

A. The Procedures Required In *Freedman* v. *Maryland* For Censorship Schemes Are Not All Applicable To Content-Neutral Laws

Petitioners argue (Br. 30-33) that, under *Freedman* v. *Maryland*, a permit ordinance like the one in this case cannot be upheld unless it ensures a prompt final judicial decision on the merits of a permit denial and unless the government bears the burden of seeking judicial review to

[5] Insofar as petitioners are still contending that the use of the term "material" grants too much discretion to administrators to determine when a falsehood on an application warrants denial of the permit (see Pet. Br. 26-28), the court of appeals correctly held that that term is sufficiently definite because it "is one of the elemental legal terms, and is considered quite definite enough to form the keystone of criminal prohibitions against fraud." Pet. App. 5a. The court also noted that eliminating the term "material" "would make the regulation more rather than less restrictive," because it would "authorize[] denying a permit to anyone who has told the park district a fib." *Ibid.* For those reasons, the use of the term "material" in the ordinance in this case does not violate the First Amendment.

effectuate the denial. Petitioners' reliance on *Freedman* is misplaced.

1. In *Freedman*, this Court struck down a Maryland statute that required a state censorship board to approve motion pictures before they could be shown anywhere in the State. The goal of the statute was to prevent the display of obscene or otherwise "immoral" motion pictures. 380 U.S. at 52 nn.1-2. Finding that the "apparatus of censorship" is one "always fraught with danger and viewed with suspicion" and that "[t]he administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech," *id.* at 57, the Court held that three procedural safeguards were necessary to uphold such a censorship scheme: (1) the censor must bear the burden of proof that the movie is unprotected expression; (2) the law must assure that "the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film," with any "restraint imposed in advance of a final judicial determination on the merits" to be "limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and (3) the scheme "must also assure a prompt final judicial decision." *Id.* at 58-59.

2. In *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), the Court ruled that some of *Freedman*'s procedural requirements do not apply to an ordinance that required the licensing of adult-oriented businesses and was "aimed at eradicating the secondary effects of crime and urban blight." *Id.* at 220. The plurality opinion in *FW/PBS* summarized *Freedman*'s procedural safeguards as follows: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Id.* at 227.

The plurality explained that the "core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." 493 U.S. at 228. As a result, "the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Ibid.*

The plurality concluded, however, that *Freedman*'s other procedural safeguards are not required in that setting.[6] 493 U.S. at 229-230. The plurality distinguished *Freedman* on the ground, *inter alia*, that it involved "direct censorship of particular expressive material," which, under the First Amendment, "is presumptively invalid." *Id.* at 229. By contrast, under the ordinance at issue in *FW/PBS*, city officials did not "exercise discretion by passing judgment on the content of any protected speech"; rather, they "review[ed] the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Ibid.* In that context, "[l]imitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy" First Amendment standards. *Id.* at 230.

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[6] The plurality opinion on this point represented the views of three Justices. Justice White, joined by the Chief Justice, would not have applied any of the *Freedman* requirements to the city's ordinance. See *FW/PBS*, 493 U.S. at 244-249 (White, J., dissenting in part); see also *id.* at 250-264 (Scalia, J., dissenting in part). A majority of the Court thus necessarily concluded that a strict deadline for judicial review was unnecessary and that the city was not required to seek judicial review of its own denial of a license or to bear the burden of proof in court; and this court's judgment embodied that conclusion. See *id.* at 238.

B. The First Amendment Does Not Require That The Park District Ordinance Ensure A Strict Deadline For Judicial Decision On The Merits Of A Permit Denial

1. Like the law challenged in *FW/PBS*, the Park District ordinance does not create the dangers of censorship that were present in *Freedman* and that led the Court to insist on a strict timetable for final judicial decision on the merits of a permit denial in that case. Like the law in *FW/PBS*, the Park District ordinance is not content-based; indeed, it is not even speech-based, since it applies to a broad range of non-expressive activities as well as expressive activities. The ordinance is directed solely at the non-communicative impact of large public gatherings, such as competing uses, congestion and damage to park property. Accordingly, as in *FW/PBS*, the *Freedman* requirement of a strict deadline for judicial disposition of a challenge to a license denial does not apply here.

2. In *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953), decided twelve years before *Freedman*, this Court squarely rejected a claim that a park permit ordinance violated the First Amendment because of the mere potential for delay associated with judicial review of permit decisions. See also *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). The Court's decision in *Poulos* was not overruled by *Freedman*, and it remains instructive regarding petitioners' claimed right to a strict deadline for judicial decision.

The ordinance at issue in *Poulos* required an individual to obtain a license to engage in expressive activity in a public park. 345 U.S. at 396-397. Poulos, a Jehovah's Witness, was denied a license to hold a religious service, and he was arrested for violating the permit ordinance when he nonetheless held the service. *Id.* at 397. This Court granted certiorari to consider the constitutionality of the license requirement, and also to consider whether "the arbitrary refusal of

such a license by the Council, resulting in delay, if appellant must * * * pursue judicial remedies, was unconstitutional, as an abridgement of free speech and a prohibition of the free exercise of religion." *Id.* at 401.

After upholding the constitutionality of the ordinance itself, the Court addressed Poulos' claim that his First Amendment rights were "abridg[ed] * * * *because of delay through judicial proceedings* to obtain the right of speech and to carry out religious exercises." 345 U.S. at 401 (emphasis added). Although the Court acknowledged that judicial review could be "exulcerating and costly," *id.* at 409, it concluded that, while "[d]elay is unfortunate," the "expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning." *Ibid.*

In *Poulos*, there was "a valid ordinance, an unlawful refusal of a license, with remedial state procedure for the correction of the error." 345 U.S. at 414. The Court held that the "state had authority to determine, in the public interest, the reasonable method for correction of the error, that is, by certiorari [review in state court]." *Ibid.* The Court did not require that the ordinance set a strict deadline for judicial resolution of the merits of a permit denial. *Poulos* thus suggests that where, as here, a permit ordinance is content-neutral and does not vest local officials with unfettered discretion, affording the applicant access to a "remedial state procedure," *ibid.*—including "the availability of prompt judicial review," *FW/PBS*, 493 U.S. at 230, through a motion for preliminary injunctive relief or other expedited resolution—is sufficient to satisfy the First Amendment.

3. That conclusion is supported by the substantial costs that a strict deadline for judicial action imposes upon the judicial system and the parties to other cases. This Court has long recognized that there is "the power inherent in

every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936). Applying a strict deadline for resolution of any particular class of cases necessarily imposes a cost on the judiciary, since it makes it more difficult for courts to give the desirable time and attention to other cases. Moreover, such a deadline imposes a cost on all other litigants, whose cases necessarily are resolved more slowly so that the favored class of cases can be resolved within the deadline. Although the burdens of a strict deadline are justified in some classes of cases, see, *e.g.*, 18 U.S.C. 3161 *et seq.* (Speedy Trial Act of 1974), those burdens should not be imposed lightly.

Moreover, imposing a strict deadline for final judicial resolution of challenges to permit denials is unnecessary to ensure expedition in appropriate cases. The standards for a temporary restraining order or preliminary injunction or other modes of expedition are designed to identify cases in which the need for a speedy decision outweighs the costs imposed on the judicial system and other litigants. Courts can be expected to act in a timely manner and apply those standards with sensitivity to First Amendment interests. Cf. *Freedman*, 380 U.S. at 57-58 ("Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression."). In some cases, however, the ordinary standards for temporary or preliminary relief will not be satisfied—*e.g.*, where the moving party has little likelihood of success on the merits. There is no need to impose costs on the judicial system and other litigants in order to ensure immediate adjudication of an insubstantial claim that a permit was invalidly denied.

4. The requirement of a "remedial state procedure for the correction of * * * error," *Poulos*, 345 U.S. at 414, is thus satisfied in cases such as this so long as there is (1) "an effective limitation on the time within which the licensor's decision must be made," *FW/PBS*, 493 U.S. at 229, (2) the applicant has prompt access to the judicial process following a permit denial, and (3) the judicial process permits effective relief tailored to the exigencies and merits of the applicant's claim. The Park District ordinance satisfies those standards. First, the permit ordinance places strict time limits on the administrative process, which petitioners do not appear to challenge here. Second, the availability of judicial review in state court on a writ of common law certiorari to review permit denials, which is in substance "the same as under the state's administrative procedure act," Pet. App. 8a-9a, provides an applicant with prompt access to judicial review that satisfies constitutional standards. Third, under Illinois law, courts have "the inherent power to issue temporary restraining orders or preliminary injunctions," *Ardt* v. *Illinois Dep't of Prof'l Reg.*, 607 N.E.2d 1226, 1230 (Ill. 1992), and that power is available in all cases, including common law certiorari cases. See, *e.g.*, *Washington* v. *Smith*, 618 N.E.2d 561 (Ill. App. Ct. 1993); compare 5 U.S.C. 705 (reviewing court may issue appropriate process "to preserve status or rights" in order "to prevent irreparable injury" pending completion of judicial review). There is no reason to believe that the Illinois courts will not provide effective and timely relief when warranted to vindicate an applicant's First Amendment rights.

C. The First Amendment Does Not Require That The Park District Initiate Judicial Proceedings To Give Effect To Its Administrative Denial Of A Permit Application.

The court of appeals correctly held that the Park District need not bear the extraordinary burden of seeking judicial review of its own decision each time it denies a permit in order to give legal effect to the denial. See Pet. App. 9a.

1. In *FW/PBS*, this Court held, in the context of the licensing of adult-oriented businesses, that the unsuccessful applicant—not the government—bears the burden of initiating judicial review of the denial of a license. See 493 U.S. at 229-230. In the present case, as in *FW/PBS*, the actions of Park District officials in denying a permit are not presumptively invalid. See *id.* at 229. To the contrary, it is presumed that government officials who administer licensing laws that contain objective standards will properly discharge their duties under those laws. See *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); accord *Armstrong*, 517 U.S. at 464. In fact, there is even less reason here than in *FW/PBS* to presume the invalidity of permit denials, because the licensing requirement in *FW/PBS* "largely target[ed] businesses purveying sexually explicit speech," 493 U.S. at 224, while the permit requirement here applies equally to all large-scale group activities in Chicago's parks, non-expressive as well as expressive.

Furthermore, in a great many (perhaps most) cases, the applicant would have no realistic basis for contesting the permit denial under speech-neutral criteria or would choose not to do so once the Park District stated the grounds for the denial, perhaps choosing instead to remedy the specified defect in the application or seek approval for another time or place. A requirement that the Park District nevertheless obtain a judicial order confirming the validity even of those

permit denials would be pointless and would impose wholly unnecessary burdens not only on the Park District and the courts but also on the permit applicants themselves.[7]

This Court's decision in *Poulos*, *supra*, also establishes that the burden of seeking judicial review may be placed on the unsuccessful permit applicant. The Court held in *Poulos* that a State has the authority to require an unsuccessful permit applicant to seek judicial review, rather than proceed without the required license and raise his legal objectives as a defense in any subsequent prosecution for violation of the licensing ordinance. 345 U.S. at 414.

2. Petitioners contend (Br. 35) that a requirement that the government initiate judicial proceedings "ensures that judicial review will occur even when the applicant lacks the funds to pursue the court battle himself." Regardless of the incentive of the particular individual or association to seek judicial review, however, where the government action in dispute is not presumptively invalid, see p. 27, *supra*, the government should not have to bear the burden of seeking review of its own action. Cf. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (noting "the presumption of regularity afforded an agency in fulfilling its statutory mandate"). In other contexts in which an individual claims that government officials have violated his constitutional rights, the government is not required to seek judicial review of its own administrative action based

[7] In addition, a requirement that the government seek judicial review of its own decisions denying permits for activities protected by the First Amendment would pose severe line-drawing problems in the context of a licensing scheme, such as the one in this case, that makes no distinction between expressive and non-expressive activities. Presumably, the Park District would have to determine, each time a permit was denied, whether the activity in question involves expressive activities, so that the Park District could determine whether it was necessary to institute a judicial proceeding.

on an individual's incentives or financial ability to pursue judicial review. The *Freedman* exception to that general rule is based upon the unique circumstances of censorship and should not be extended to the present case.[8]

3. Petitioners contend (Br. 39-40) that the government should bear the burden of proof in court with respect to the validity of the permit denial. For the same reasons that the First Amendment does not require the government to initiate judicial proceedings to effect an administrative denial of a permit, the First Amendment does not require the government to bear the burden of proof once in court. See *FW/PBS*, 493 U.S. at 229. As explained above, permit decisions under the Park District ordinance are not content-based; rather, they are based on objective and reasonable criteria, and are thus distinguishable from the presumptively invalid acts of censors at issue in *Freedman*.

[8] In *FW/PBS*, the plurality observed that in *Freedman*, the motion picture distributor "was likely to be deterred from challenging the decision to suppress the speech," whereas in *FW/PBS*, "[b]ecause the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." 493 U.S. at 229-230. Insofar as that consideration is relevant here, it supports our argument, because "the license is the key" to the applicant's ability to engage in its planned expressive activity in a park. In our view, however, the key distinction between this case and *Freedman* is the distinction between content-based censorship, as in *Freedman*, and a content-neutral (indeed, speech-neutral) permit requirement such as the one in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,
Petitioners,

v.

CHICAGO PARK DISTRICT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

This brief in support of petitioners is submitted by Public Citizen, Inc. ("Public Citizen"). Public Citizen is a nonprofit research, lobbying, and litigation organization based in Washington, D.C., with approximately 150,000 members nationwide. Public Citizen advocates for consumer rights in the marketplace, safe products, a healthy environment and workplace, clean and safe energy resources, and corporate and government accountability.

Public Citizen has no direct stake in this Court's determination of whether the Chicago Park District's regulation of free speech in Chicago parks is analyzed as a prior restraint and, if so, which of the procedural safeguards imposed in *Freedman v. Maryland,* 380 U.S. 51 (1965), are applicable. Nevertheless, Public Citizen is concerned about how the Court's decision in this case may affect the myriad of other contexts in which government-mandated licensing regimes effect a prior restraint on speech.

For example, numerous state and local jurisdictions have enacted licensing schemes that require nonprofit organizations such as Public Citizen to register, pay a filing fee, and submit detailed information about their operations and fundraising efforts as a condition of sending any communications into the jurisdiction, including solicitations for charitable contributions. Direct mail campaigns are the primary means by which Public Citizen (and many other charities) communicate with and educate the public; these mailings highlight the projects, causes, and issues promoted by the charity and urge current

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no counsel for any party to this case authored this brief in whole or in part, and no person or entity other than this amicus and its counsel has made a monetary contribution to its preparation and submission. All parties to the case have consented to the filing of this brief, and the letters of consent have been filed with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

and prospective members to support these endeavors and become engaged in the political process. Charitable solicitation laws that prohibit this speech—unless the charity first obtains a permit from any locality that requires one—seriously hamper the ability of nonprofit organizations such as Public Citizen to carry out their mission and create the potential for censorship by government regulators based on the content of the organization's speech.

Thus, at a bare minimum, these licensing regimes must be accompanied by procedural safeguards to alleviate the risk of censorship and to prevent any delay in the issuance of a permit. Public Citizen is currently challenging the constitutionality of one charitable solicitations licensing regime that, in its view, lacks such safeguards, *see Public Citizen v. Pinellas County*, Civil Action No. 8:01-CV-943-T-23TGW (M.D. Fla.), *available at* http://www.citizen.org/litigation/briefs/PinellasComp.htm, and has brought similar constitutional challenges in the past. Any decision by this Court in the instant case determining the procedural safeguards that must accompany a prior restraint of speech may affect not only the facial validity of the county ordinance that Public Citizen contests in its case, but the constitutionality of a host of charitable solicitation regulatory regimes and other types of permitting schemes nationwide.

Public Citizen's view, as explained below, is that the court of appeals erred in refusing to apply the *Freedman* procedural safeguards in the context of a park permitting system. We are concerned that the lower court's analysis, if adopted by this Court, will seep into other settings involving prior restraints on speech. But even if this Court agrees with the lower court, Public Citizen believes that it is important for this Court to distinguish between the licensing of speech that involves a limited governmental resource, such as a park, and speech that occurs in a context where there is no competition for scarce space and accordingly no need for regulation in advance of speech. Prior restraints in the latter context lack a compelling justification, pose a significant potential for censorship and

delay in the issuance of a permit, and therefore should be accompanied by the full panoply of *Freedman* protections.

For these reasons, Public Citizen believes that this brief will add an important perspective to the consideration of the First Amendment principles at stake here, and one that might otherwise not be presented for the Court's review.

STATEMENT OF THE CASE

The Chicago Park District regulates the use of all parks in the city through a licensing ordinance ("ordinance"). That ordinance requires that anyone seeking to use amplified sound or to hold a rally that involves fifty or more persons in a city park must first obtain a permit. Chi. Park Dist. Code ch. VII § C (Pet. App. 91a-92a). The ordinance does more, however, than authorize a government official to undertake the ministerial tasks of taking names and contact information from those who propose to use the parks and resolving scheduling conflicts among various parties competing for use of the same space. Instead, it authorizes (but does not require) the denial of permits on the basis of various discretionary criteria listed in the Ordinance. *Id.* § C(5)(e) (Pet. App. 96a-98a).[2]

Because the ordinance does not purport to allow the city to deny a permit based on the content of the message to be

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[2] *See, e.g., id.* § C(5)(e)(3) (authorizing denial because the application "contains a material falsehood or misrepresentation") (Pet. App. 97a); *id.* § C(5)(e)(5) (authorizing denial because the applicant "has on prior occasions damaged Park District property and has not paid in full for such damage") (Pet. App. 97a); *id.* § C(5)(e)(13) (authorizing denial where the applicant "has violated the terms of prior permits issued to the applicant") (Pet. App. 98a); *see also id.* § C(6)(c) (providing that "[a]ny requirements for use fees, deposits, proof of insurance or premium for insurance may be waived . . . if the activity is protected by the First Amendment of the United States Constitution and the condition would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity") (Pet. App. 100a).

conveyed by the permit applicant, the Court of Appeals for the Seventh Circuit concluded that the licensing scheme should be treated as a time, place, and manner regulation that is not subject to the rules regarding prior restraints on speech. Accordingly, the court held that the procedural safeguards announced in *Freedman v. Maryland,* 380 U.S. 51 (1965), did not apply, and thus, that the Park District did not bear the burden of seeking judicial review before it denied a permit. *See Thomas v. Chicago Park Dist.,* 227 F.3d 921-26 (7th Cir. 2000) (Pet. App. 2a-8a); *accord MacDonald v. City of Chicago,* 243 F.3d 1021, 1032 (7th Cir. 2001) (relying on the *Thomas* analysis in a case involving an application by the same parties for a parade permit under a similar ordinance). Moreover, because it believed that regulation of parks poses a lesser threat of censorship than licensing regimes involving adult businesses, the court below also found no fault with the ordinance's failure to require a prompt judicial disposition of any challenge to the Park District's refusal to issue a permit. *Thomas,* 227 F.3d at 927-28 (Pet. App. 11a-12a).

SUMMARY OF ARGUMENT

1. The Chicago Park District's ordinance requires that anyone seeking to use amplified sound or to hold a rally that involves fifty or more persons in a city park must first obtain a permit. Because this permitting scheme gives "public officials the power to deny use of a forum in advance of actual expression," *Ward v. Rock Against Racism,* 491 U.S. 781, 795 n.5 (1989) (quoting *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975)), it imposes a prior restraint on speech and therefore must avoid the twin evils of unbridled discretion left in the hands of a government official and an absence of adequate procedural safeguards to guarantee the prompt issuance of the permit. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 225-26 (1990) (O'Connor, J., joined by Stevens and Kennedy, JJ.). The requisite safeguards were announced in *Freedman v. Maryland,* 380 U.S. 51 (1965), and have been repeatedly reaffirmed by this Court.

Because a park is "a limited space" that calls for some government regulation to mediate conflicts between competing speakers, and because the ordinance does not purport to authorize the city to deny a permit based on the content of the speaker's message, the Seventh Circuit concluded that the permitting regime should be treated as a time, place, and manner regulation that is not subject to the normal rules, including the *Freedman* safeguards, that this Court has held govern prior restraints on speech. This conclusion was in error. These two conceptual First Amendment frameworks are not mutually exclusive. Although this Court has recognized the government's power to regulate competing uses of public forums by requiring a permit for those who wish to hold a march, parade, or rally, *see Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992), the Court has nonetheless treated any such permitting scheme as involving a prior restraint of speech that must satisfy additional constitutional requirements—namely, the *Freedman* procedural protections and the requirement of "narrow, objective, and definite standards to guide the licensing authority" in the issuance of a permit. *Id.* at 131 (citation omitted).

This Court's precedents establish that when a regulation concerning speech does not authorize the suppression of speech in advance of its expression, *see, e.g., Ward,* 491 U.S. at 795 n.5, or when the issuance of a permit involves a purely ministerial decision, *see, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 644 (1981), the *Freedman* safeguards are inapposite. The ordinance here, however, both suppresses speech in advance of its expression and involves more than a merely ministerial requirement that those who propose to use the parks provide their names and contact information so that the city may resolve scheduling conflicts among competing speakers. That the provisions in this ordinance contain discretionary criteria governing whether a permit should issue is all the more reason to require the full *Freedman* safeguards because the surest bulwarks against a potential abuse of such discretion by government regulators are

procedural guarantees that require regulators to seek judicial approval before they may withhold permits and that prevent delay in the resolution of outstanding issues.

2. Licensing schemes take a variety of forms, however, and the procedural safeguards required for these differing schemes to pass constitutional muster need not be identical. Many of the regulatory regimes that affect speech do not involve a limited public resource, such as a park, but instead involve speech that is disseminated in an arena where there is no competition for scarce space and, accordingly, less, if any, reason for requiring a license *in advance of* speech. Permitting schemes that require charitable organizations to register and obtain a license before they may communicate with residents in a locality, if such communications include a solicitation for charitable contributions, are one common example. *See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988). While such restraints on speech lack the justifications of scarce space and competition for resources that motivate the regulation of public parks, they nonetheless present the same risks of censorship and delay as a park permitting system. Licensing schemes that arise in these more open-ended contexts present a particularly cogent case for the full complement of *Freedman* procedural protections.

Many of these charitable solicitations permitting schemes present serious dangers of abuse of power and censorship based on the content of speech because of the subtle, subjective, and discretionary judgments they call for regarding whether a charity or professional fundraiser has made, or will make, "misleading" or fraudulent solicitations—dangers that are exacerbated in those regimes that require advance submission of scripts of proposed solicitations. *See, e.g., Telco Communications, Inc. v. Carbaugh,* 885 F.2d 1225, 1232-34 (4th Cir. 1989). In addition, unlike permits in the park context, which often involve one-time events, charitable solicitations and adult business licensing schemes, among others, frequently involve an initial application and then periodic renewals. This periodic contact with licensing authorities exacerbates the risk

of censorship by giving licensing authorities the opportunity to punish speakers for the viewpoints they have expressed since receiving their initial permits. *See Lakewood v. Plain Dealer,* 486 U.S. 750, 760 (1988). And whereas petitioners here retain multiple other avenues to convey their message in the event they are denied a park permit, a charity denied a registration in a jurisdiction is completely silenced in that locale. That the organization has no meaningful recourse for communicating its message provides one more reason for this Court to require a prompt judicial *disposition* of any licensing issue in this context, and not merely prompt *access* to judicial review.

Finally, even if this Court decides that the third *Freedman* safeguard, requiring that the licensing authorities shoulder the burden of seeking judicial review, does not apply to a parade or park licensing scheme because time constraints make that safeguard impracticable in that context, there is no reason to extend that logic to those regimes where there is no pressure to resolve a permitting issue by any particular date and time, no conflict among potential speakers, and no excuse for the jurisdiction to deny the applicant at least a provisional permit pending a judicial resolution of the dispute.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE PARK DISTRICT'S ORDINANCE IMPOSES A PRIOR RESTRAINT ON SPEECH.

A. It has long been established that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (per curiam) (quoting *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963)). Prior restraints are presumptively invalid because "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad,*

420 U.S. 546, 559 (1975). Although prior restraints of speech such as licensing schemes are not unconstitutional per se, this Court long has required that they be accompanied by the strictest of procedural safeguards to obviate the dangers of censorship and to prevent an indefinite postponement of the proposed speech.

In *Freedman v. Maryland,* this Court struck down as lacking such safeguards a Maryland statute that required all theater operators to submit to the State Board of Censors the motion pictures they proposed to exhibit and to obtain a license to show the films. The Court determined that the following three procedural protections were necessary and missing from the Maryland censorship regime, which involved a classic prior restraint of speech: (1) any restraint prior to judicial review may be imposed only for a specified brief period during which the status quo must be maintained; (2) a prompt final judicial determination must be assured; and (3) the regulator must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. 380 U.S. at 58-60.

Since *Freedman,* this Court has repeatedly affirmed the vitality of these safeguards in a variety of contexts involving prior restraints on speech. *See, e.g., Southeastern Promotions,* 420 U.S. at 560-62 (finding procedural safeguards accompanying a municipal theater's refusal to allow the performance of "Hair" inadequate where there was no procedure for a prompt judicial determination and the status quo was not maintained pending review); *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 367-75 (1971) (construing a federal customs law permitting the seizure of allegedly obscene materials to comply with the *Freedman* procedural safeguards to preserve its constitutionality); *Blount v. Rizzi,* 400 U.S. 410, 417-20 (1971) (striking down a federal statute authorizing the Postmaster General to impose restrictions on use of the U.S. mails where allegedly obscene materials involved because of the lack of provision for a prompt judicial adjudication and the failure to require the government to initiate judicial proceedings); *Teitel Film Corp.*

v. Cusack, 390 U.S. 139, 141-42 (1968) (per curiam) (finding motion picture censorship ordinance invalid because of the lack of adequate time limits and any provision for a prompt judicial decision).[3]

Despite this established pedigree, the court below found a prior restraint analysis of the Chicago Park District ordinance "unhelpful." Because a park is "a limited space" that calls for some regulation, and because the ordinance did not purport to allow the regulators to deny a permit based on the content of proposed speech in the parks, the lower court treated the ordinance solely as a content-neutral time, place, and manner restriction. *See Thomas,* 227 F.3d at 923-24 (Pet. App. 2a-5a). Yet the Park District's licensing scheme gives "public officials the power to deny use of a forum in advance of actual expression"—the very essence of a prior restraint on speech. *See Ward v. Rock Against Racism,* 491 U.S. 781, 795 n.5 (1989) (quoting *Southeastern,* 420 U.S. at 553). The fact that petitioners may stand alone or in small numbers in a Chicago

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[3] There are two kinds of prior restraints on speech. The first involves actual physical interference with speech in advance of its expression—that is, a literal prior "restraint" of speech. *See, e.g., Thirty-Seven Photographs,* 402 U.S. 363 (confiscating photographs); *Blount,* 400 U.S. 410 (returning mail); *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969) (arresting marchers in the midst of their march who lacked a permit). The other and more typical type of prior restraint involves a legal requirement that a speaker obtain a permit in advance of expression, where the legal requirement is enforced not by an actual physical disruption of unlicensed speech while it is occurring, but by threatened sanctions or other enforcement action to be taken after the unlicensed speech has been completed. Such laws are often subject to facial challenges before any such sanction has been imposed. *See, e.g., FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990); *Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988); *Lakewood v. Plain Dealer,* 486 U.S. 750 (1988). Both the instant case and many other licensing regimes, such as those regulating charitable solicitations, fall into this second category of prior restraint.

park and express their opposition to the criminalization of marijuana does not negate the fact that if they wish to hold a rally or use sound amplification, they must first obtain a permit. It is as true today as it was fifty years ago that "[l]oud-speakers are today indispensable instruments of effective public speech," *Saia v. New York,* 334 U.S. 558, 561 (1948), and thus, a regulation that requires a permit to use sound amplification in a park imposes a prior restraint on speech. *See id.* at 559-60 (striking down ordinance forbidding the use of sound amplification devices without permission as an invalid prior restraint on speech); *accord Cannabis Action Network, Inc. v. City of Gainesville,* 231 F.3d 761, 769-72 (11th Cir. 2000) (finding sound ordinance an unconstitutional restraint on speech), *petition for cert. filed,* 69 U.S.L.W. 3691 (U.S. Mar. 29, 2001) (No. 00-1503). Accordingly, there is no doubt that the ordinance countenances a prior restraint of speech.

The Seventh Circuit's rejection of the "prior restraint" doctrinal framework had serious consequences for petitioners' constitutional challenge to the ordinance. First, its refusal to treat the Park District's permit requirement as a prior restraint led the court to dismiss as "semantic nit-picking" petitioners' claims that the ordinance is facially invalid because it confers unfettered discretion on city regulators to decide which applicants deserve permits to speak in public parks. *See Thomas,* 227 F.3d at 924 (Pet. App. 5a). The court of appeals paid little heed to the Magistrate Judge's assessment that the ordinance lacked "any neutral criteria" to guide the Park District's decision whether to issue a permit, *see MacDonald v. Chicago Park Dist.,* No. 97 C 2963, 1999 U.S. Dist. LEXIS 7416, at *13 (N.D. Ill. Mar. 8, 1999) (Pet App. 64a), or to the "substantial power . . . to censor" that the ordinance conferred "based on the content or viewpoint of speech." *MacDonald v. Chicago Park Dist.,* No. 97 C 2963, 1998 U.S. Dist. LEXIS 7131, at *27 (N.D. Ill. Apr. 27, 1998) (Pet. App. 33a). *See Thomas,* 227 F.3d at 924-25 (Pet. App. 4a-7a).

Second, because it believed that the ordinance was merely a content-neutral time, place, and manner restriction, the court

found the *Freedman* safeguards inapposite. *See id.* at 926 (Pet. App. 7a-8a). Accordingly, the court held that it was the petitioners who bore the burden of seeking judicial relief from a denial of a park permit. *Id.* (Pet. App. 9a). Because the ordinance did not purport to authorize the city regulators "to evaluate the content or message of the activity regulated," *id.* (Pet. App. 8a), the court saw little reason to question the efficacy or speed of the state common law certiorari avenue to judicial review. Instead, the court concluded that "a more relaxed attitude toward the pace of judicial review" was warranted, *id.* at 928 (Pet. App. 12a), despite the fact that the failure to impose a "deadline" for judicial review, *id.* at 927 (Pet. App. 11a), means that those who wish to hold rallies in the Chicago parks may face an indefinite postponement of their speech pending judicial review.

The court of appeals' refusal to recognize that the ordinance imposes a prior restraint was error. These two First Amendment frameworks are not mutually exclusive. Concededly, the ordinance regulates a scarce governmental resource—city parks—over which there is undoubtedly considerable competition and which call for some form of regulation. Government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock,* 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida,* 385 U.S. 39, 47 (1966)). Thus, this Court has recognized that "government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade or rally." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992). At the same time, however, this Court has consistently treated any permitting scheme—at least where there is an element of discretion regarding the issuance of a permit—as involving a prior restraint of speech that must satisfy additional constitutional requirements, regardless of whether the regulation is otherwise a content-neutral regulation of the time, place, and manner of

speech. *Id.*[4]

The Court's ruling in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), in which the Court held that a Dallas regulation of sexually oriented businesses imposed an impermissible prior restraint on speech, illustrates the correct approach. The Fifth Circuit had upheld the licensing scheme as a valid time, place, and manner regulation in reliance on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), without requiring the procedural safeguards set forth in *Freedman*. *FW/PBS*, 493 U.S. at 222 (citing 837 F.2d 1298, 1303 (5th Cir. 1988)). As Justice O'Connor explained, however, in a portion of her opinion joined by three Justices: "Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses." *Id.* at 223 (O'Connor, J., joined by Stevens and Kennedy, JJ.); *accord id.* at 238 (Brennan, J., concurring, joined by Marshall and Blackmun, JJ.) (agreeing that the licensing scheme lacked the requisite safeguards).

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[4] By and large, the circuit courts have agreed. *See, e.g., United States v. Frandsen*, 212 F.3d 1231, 1238 (11th Cir. 2000) (recognizing that although government may regulate the time, place, and manner of expression in parks, "a regulation constituting a prior restraint on expression must also contain certain procedural safeguards as set forth in *Freedman v. Maryland*"); *Beal v. Stern*, 184 F.3d 117, 124 (2d Cir. 1999) ("A regulation may constitute a prior restraint even if it is not content-based."); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 995 (4th Cir. 1995) (en banc) ("[O]therwise valid content-neutral time, place, and manner restrictions that require governmental permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decisionmaker and provide for the *Freedman* procedural safeguards.").

Justice O'Connor's opinion emphasized that "[l]ike a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license." *Id.* at 226 (O'Connor, J.). Because the Dallas ordinance failed to set an effective limitation on the time within which the licensor's decision must be made and to provide an avenue for prompt judicial review "so as to minimize suppression of the speech in the event of a license denial," *id.* at 229, the regulatory scheme "allow[ed] indefinite postponement of the issuance of a license," *id.* at 227, and was therefore invalid. Although there was disagreement between the three Justices who joined Justice O'Connor's opinion and the three who joined Justice Brennan's opinion as to whether the third *Freedman* safeguard—which requires the regulator to bear the burden of going to court and the burden of proof once in court—applies to a commercial enterprise such as an adult business, *compare id.* at 229-30 (O'Connor, J.), *with id.* at 239-42 (Brennan, J.), there was no quarrel among these six with the proposition that "the first two safeguards are essential." *Id.* at 228 (O'Connor, J.). Only two Justices who dissented in part agreed with the Fifth Circuit's holding that *Freedman* was wholly inapposite because the ordinance was a time, place, and manner regulation. *See id.* at 244-48 (White, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.).

The same logic prevailed in *Forsyth County*, which involved the other evil the *FW/PBS* plurality identified in prior restraint licensing schemes: the potential for the exercise of "unbridled discretion" in the issuance of a permit. *FW/PBS*, 493 U.S. at 225-26 (O'Connor, J.). In considering that ordinance, which required a permit and a fee for parades and assemblies, the *Forsyth County* court acknowledged that regulation of the time, place, and manner of speech in public fora was appropriate. The Court nonetheless held the ordinance invalid because it imposed a prior restraint on speech without adequate safeguards—in that case, without limits on the discretion to be exercised by the administrator in setting the

permit fee. 505 U.S. at 130-31. The Court found fault with the fact that "[t]he decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator." *Id.* at 133.

The key to distinguishing the kinds of regulations involved in *FW/PBS* and *Forsyth County* from those that the Court has upheld as valid time, place, and manner restrictions, *see, e.g., Ward v. Rock Against Racism,* 491 U.S. 781 (1989); *Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981); *Cox v. New Hampshire,* 312 U.S. 569 (1941), is that none of the latter cases authorized officials to exercise any discretion to deny permission to use a public forum. *Cox* upheld a state statute prohibiting a parade or procession without a special license, but was careful to emphasize that the statute was administered in a "fair and non-discriminatory manner," *id.* at 577, and without risk of "uncontrolled official suppression" of opinions on public questions. *Id.* at 578 (citation omitted). Similarly, in *Heffron*, the Court upheld a state rule that those who seek to distribute printed materials within state fairgrounds during a state fair obtain a permit to do so at fixed locations. In treating the rule as a time, place, and manner regulation, the Court noted that space in the fairground was rented in "a nondiscriminatory fashion on a first-come, first-served basis with the rental charge based on the size and location of the booth," 452 U.S. at 644, and thus the rule did not suffer from "the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority." *Id.* at 649. *Ward,* on the other hand, involved no prior restraint at all because the guidelines for use of the Central Park bandshell granted no authority to public officials to forbid speech in advance of its expression in the bandshell, but merely allowed the city to set limits on the volume of performances there. *See* 491 U.S. at 795 n.5.

Thus, the conclusion to be drawn from this Court's precedents is that (1) when a regulation concerning speech does not authorize the advance suppression of speech, *id.*, or (2) when the granting of a license in advance of speech

involves a purely ministerial action, *see Heffron,* 452 U.S. at 644; *cf. Southeastern Promotions,* 420 U.S. at 554 ("Approval [of a permit] was not a matter of routine."), the *Freedman* safeguards do not apply. Thus, if a park regulation merely required applicants to supply their names, contact information, and proposed dates for use of specified parks so that park officials could resolve scheduling conflicts, there would be no need for the *Freedman* requirements. The Park District's ordinance here is not such a ministerial regulation, however, as it "involves appraisal of facts, the exercise of judgment, and the formation of an opinion" by the licensing authority. *Forsyth County,* 505 U.S. at 131 (quoting *Cantwell v. Connecticut,* 310 U.S. 296, 305 (1940)); *see also MacDonald v. Safir,* 206 F.3d 183, 195 (2d Cir. 2000) (finding that the level of discretion dictates whether the burden is on the city commissioner of going to court); *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1362 (11th Cir. 1999) ("[T]he cases show that virtually any amount of discretion beyond the merely ministerial is suspect."), *cert. denied,* 529 U.S. 1053 (2000).

That statutory language may be imprecise, as the Seventh Circuit observed, *see Thomas*, 227 F.3d at 924-25 (Pet. App. 4a-7a), is all the more reason to enforce the "principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1963). In other words, the best insurance against an abuse of the discretionary criteria built into the Chicago Park District ordinance, such as whether there has been a violation of a prior permit or other disqualifying misconduct, *see* note 2, *supra,* are the requirements that the Park District seek court approval of its basis for denying a permit and that the court rule swiftly on the dispute. At the very least, the risk of censorship would be abated if the ordinance guaranteed that the city would permit a proposed rally in the park (when there is no other group that previously requested the same place and time), *unless and until* a court has sanctioned the denial of a permit.

B. The court of appeals acknowledged that several decisions from other circuits had held that licensing schemes

must provide a deadline for judicial review of the proposed suppression of speech, but distinguished these as involving special licensing regimes for sexually oriented businesses.[5] *See Thomas,* 227 F.3d at 927 (Pet. App. 11a). In the court's view, "greater judicial vigilance" is warranted in the adult business context because there regulators are concerned with the content of the businesses' speech, whereas, by contrast, the Park District's ordinance does not "relate to controversial or unpopular expression" and hence does not require the same expeditious judicial disposition. *Id.* at 928 (Pet. App. 12a).

Even if licensing schemes involving adult entertainment are deemed to be content-based, *but see City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47-48 (1986), it is ironic that the Seventh Circuit would refuse to apply the *Freedman* standards to political speech in a park, but would grant their fuller application to adult businesses, which involve what the Court has deemed "expressive conduct" only "within the outer perimeters of the First Amendment." *Barnes v. Glen Theater, Inc.,* 501 U.S. 560, 566 (1991). By contrast, this Court has recognized that streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.,* 307 U.S. 496, 515 (1939). As Justice Harlan put it: "The right to assemble peaceably to voice political protest is at least as basic as the right to exhibit a motion picture which may have some aesthetic value." *Shuttlesworth v. Birmingham,* 394 U.S. 147, 162 (1969) (Harlan, J., concurring). The right to engage in adult entertainment has never been deemed to merit the same level of protection as core political speech in a traditional public

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[5] *See, e.g., Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097 (9th Cir. 1998); *11126 Baltimore Blvd., Inc. v. Prince George's County,* 58 F.3d 988 (4th Cir. 1995) (en banc).

forum, yet the Seventh Circuit gave less protection to the latter. *Cf. Lorillard Tobacco Co. v. Reilly,* 121 S. Ct. 2404, 69 U.S.L.W. 4582, 4595-4601 (2001) (Thomas, J. concurring).

What is especially troubling about adopting "a more relaxed attitude toward the pace of judicial review" in the case of demonstrations in a park, *Thomas,* 227 F.3d at 928 (Pet. App. 12a), is the consequence of delays that arise in the permitting process. A public rally on the issues of the day, unlike adult entertainment, is frequently time-sensitive; to delay the issuance of a permit for any significant period of time is effectively to foreclose the speech. *Shuttlesworth,* 394 U.S. at 163 ("In contrast [to a movie], timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.") (Harlan, J., concurring). As this Court recognized in *Lakewood v. Plain Dealer*: "Until a judicial decree to the contrary, the licensor's prohibition stands. In the interim, opportunities for speech are irretrievably lost." 486 U.S. 750, 758 (1988). At the very least, when core political speech is at issue, a permit should be issued if a reviewing court fails to reach a decision within a reasonably brief period of time. *Cf. Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 894 (6th Cir. 2000) (suggesting the issuance of a provisional license in the adult business context); *11126 Baltimore v. Prince George's County,* 58 F.3d 988, 1001 n.18 (4th Cir. 1995) (en banc) (same). If mere *access* to a judicial forum, be it state or federal, were sufficient, but a prompt decision not required, the second *Freedman* safeguard would be rendered virtually meaningless. *Nightclubs,* 202 F.3d at 893; *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1101 (9th Cir. 1998). As this Court has recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

Nor is there any reason to jettison a requirement that the Park District bear the burden of initiating court proceedings—the third *Freedman* safeguard—to obtain a

judicial officer's approval of the denial of a permit to hold a rally or to use sound amplification equipment in city parks. Relying on *FW/PBS,* the Seventh Circuit held this *Freedman* inapplicable to facially content-neutral regimes such as the ordinance here. *Thomas,* 227 F.3d at 926 (Pet. App. 9a). That reliance was misplaced. Only three Justices endorsed the abandonment of the third *Freedman* safeguard in a situation where they believed the other two safeguards applied, *see FW/PBS,* 493 U.S. at 228-30 (O'Connor, J.), and thus, the third *Freedman* factor has not been repudiated by a majority of the Court.

Even accepting Justice O'Connor's opinion as binding precedent, its rationale does not apply to those who would seek to engage in political speech in a traditional public forum such as a park. The *Freedman* court placed the burden of initiating judicial proceedings on the regulator because the proposed speaker's stake in obtaining a particular license might well be insufficient to give it the incentive to challenge a license denial in court. 380 U.S. at 59. The plurality in *FW/PBS,* by contrast, found the incentives to be quite different when a license to operate an adult business was at issue because there "the license is the key to the applicant's obtaining and maintaining a business," and thus "there is every incentive for the applicant to pursue a license denial through court." *FW/PBS,* 493 U.S. at 229-30 (O'Connor, J.). A potential speaker in a park has more in common with a theater owner who is deciding whether to show an allegedly objectionable motion picture, as in *Freedman,* than it does with a commercial business whose entire livelihood is on the line, as in *FW/PBS.* The Eleventh Circuit appropriately recognized as much in *Cannabis Action Network,* 231 F.3d at 774-75 (placing the burden on the city to deny a permit for a demonstration where the speaker was a nonprofit public interest group that sought a one-time permit to engage in nonprofit, political activities, rather than a commercial enterprise).

The fundamental defect in the Seventh Circuit's reasoning in rejecting both a requirement that judicial proceedings

regarding a permit be promptly resolved and that the Park District bear the burden of initiating these proceedings, is that the court underestimated the significant potential for pretextual permit denials triggered by covert hostility toward unpopular speakers or controversial viewpoints. The U.S. Reports are filled with instances in which this Court concluded that elastic criteria permitting a regulator to deny a license for speech impermissibly authorized clandestine censorship based on the content of speech, even though the regulatory regime on its face, in contrast to the statute in *Freedman,* did not purport to establish a censorship system. *See, e.g., Plain Dealer,* 486 U.S. at 763-64 ("[B]ecause without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker," government may not place conditions, even if content-neutral, on the issuance of a permit if they depend on a government official's "boundless discretion"); *Hynes v. Mayor of Oradell,* 425 U.S. 610, 622 (1976) (concluding that the failure to explain what "identification" is required in advance of canvassing gives police "the *effective* power to grant or deny permission to canvass for political causes"); *Saia,* 334 U.S. at 562 ("Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice."). As a Florida district court recently observed in rejecting the Seventh Circuit's analysis in a similar case involving permits for festivals:

> [T]he danger in a permitting scheme that seeks to restrict speech in advance is that public officials will be able to "filter" protected speech by selectively granting permits on the basis of content. This danger can exist even where the permitting scheme seeks only to restrict expressive activity, rather than expression itself, because an overly broad permitting scheme can still provide officials with a mechanism for covertly discriminating on the basis of content.

Florida Cannabis Action Network, Inc. v. City of Jacksonville, 130 F. Supp. 2d 1358, 1365-66 (M.D. Fla. 2001).

It is also for this reason that it makes no difference whether the ordinance here is termed a "licensing," as opposed to a "censorship," scheme, if the discretion it confers is broad enough to allow the Park District to abuse its authority and deny a permit whenever it disagrees with the message to be conveyed in the park. And whether the suppression of speech is based on legitimate content-neutral criteria or not, the fact remains that the speaker is silenced under this ordinance until a court—after proceedings brought by the proposed speaker—says otherwise. *See FW/PBS,* 493 U.S. at 226 ("Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license."). Thus, in our view, the court of appeals erred in refusing to extend the full complement of procedural safeguards announced in *Freedman* to the Park District's ordinance.

II. REGARDLESS OF WHETHER IT FINDS ALL THREE *FREEDMAN* PROCEDURAL SAFEGUARDS FULLY APPLICABLE TO A LICENSING SCHEME INVOLVING A PARK, THESE SAFEGUARDS ARE VITAL IN CONTEXTS THAT DO NOT INVOLVE A LIMITED PUBLIC RESOURCE.

As the court of appeals appropriately recognized, parks are limited public resources that require some governmental management so that multiple rallies are not held at the same time and so that dueling sound equipment does not cause one speaker to drown out another. *Thomas,* 227 F.3d at 924 (Pet. App. 3a). As this Court recognized in *Cox v. New Hampshire,* regulation of such limited public spaces through licensing schemes serves to facilitate "proper policing" and "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to

minimize the risk of disorder." 312 U.S. 569, 576 (1941) (citation omitted); *accord Forsyth County,* 505 U.S. at 130.

Permitting schemes that involve a prior restraint on expression take many forms, however, and do not require identical procedural safeguards to assure their constitutionality. *E.g., United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 374 (1971) (noting that constitutionally permissible time limits for determinations may vary in different contexts). Many of these regulatory regimes do not involve a limited government resource, such as a park, but instead involve speech that arises in a setting where there is no competition for scarce space and accordingly, where there is much less, if any, justification for requiring a license *in advance of* speech.

Licensing regimes that require charitable organizations to register and obtain a license before they may even send letters via the U.S. mails that include a solicitation for charitable contributions are a prime example. *See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988); *American Target Advertising, Inc. v. Giani,* 199 F.3d 1241 (10th Cir.), *cert. denied,* 121 S. Ct. 34 (2000). Such prior restraints on speech lack the rationales of scarce space and competing speakers, and yet they present the very same potential for censorship and delay as a park licensing system. Licensing schemes in these more open-ended settings, where there is often no legitimate reason for a prior restraint on speech, present an even more compelling scenario for the application of the full panoply of *Freedman* procedural protections than do prior restraints involving public streets and parks.[6]

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[6] There are other licensing schemes that at least indirectly affect free speech, such as regimes that require licenses as a condition of practicing law or of engaging in various securities transactions. *See Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978). "Regulations on entry into a profession, as a general matter, are constitutional if they 'have a rational connection with the applicant's

(continued...)

This Court has recognized that "charitable appeals for funds . . . involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980). In *Riley,* the Court made clear that the *Freedman* safeguards applied to licensing schemes governing charitable solicitations. The North Carolina Charitable Solicitations Act required professional fundraisers to await a determination regarding their license application before engaging in solicitation. *Riley,* 487 U.S. at 801. The Court assumed, without deciding, that the State's interest justified requiring fundraisers to obtain a license before soliciting, but held that "such a regulation must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" *Id.* at 802 (quoting *Freedman v. Maryland,* 380 U.S. 51, 59 (1965)). That requirement was not met there because the statute did not purport to set a deadline for when a determination would be made and therefore "permit[ted] a delay without limit." Because professional fundraisers were not permitted to solicit as soon as their permit applications were filed, "delay compel[led] the speaker's silence," and therefore, the Court concluded, the licensing provision could not stand. *Id.*

Both before and after *Riley,* the federal courts have held

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[6](...continued)
fitness or capacity to practice' the profession." *Lowe v. Securities & Exch. Comm'n,* 472 U.S. 181, 228 (1985) (White, J., concurring) (quoting *Schware v. Board of Bar Exam'rs,* 353 U.S. 232, 239 (1957)); *see also Thomas v. Collins,* 323 U.S. 516, 544-45 (1945) (Jackson, J., concurring). And, of course, as discussed in Part I above, licensing schemes are common in the adult business context, although these present their own distinct issues because of the commercial setting in which the speech arises and the secondary effects of such businesses on the community.

the *Freedman* safeguards applicable to licensing schemes that prohibit charitable solicitation before regulatory authorities have issued a permit. *See, e.g., Giani,* 199 F.3d at 1253-54 (considering *Freedman* safeguards); *Famine Relief Fund v. West Virginia,* 905 F.2d 747, 753 (4th Cir. 1990) (finding that charitable solicitations statute did not comply with *Freedman* because it imposed the burden on the charity to seek an administrative hearing and judicial review after its registration is denied, did not clarify who bore the burden of proof in these proceedings, and did not permit the solicitation of funds while judicial review was pending); *Fernandes v. Limmer,* 663 F.2d 619, 628 (5th Cir. 1981) (holding that ordinance governing literature distribution and funds solicitation in an airport lacked the *Freedman* safeguards because it failed to assure prompt judicial review of permit denials and because "the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights"), *cert. dism'd,* 438 U.S. 1124 (1992); *International Soc'y for Krishna Consciousness, Inc. v. Rochford,* 585 F.2d 263 (7th Cir. 1978) (holding that regulation of distribution or literature and solicitation of contributions in airports lacked the *Freedman* safeguards in failing to provide for either administrative or judicial review of a denial or revocation of a license); *American Charities for Reasonable Fundraising Regulation v. Pinellas County,* 32 F. Supp. 2d 1308 (M.D. Fla. 1998) (holding that the first two *Freedman* safeguards apply to a charitable solicitation licensing scheme), *aff'd in relevant part,* 221 F.3d 1211 (11th Cir. 2000).[7]

There is no basis for disturbing or diluting the *Riley* court's conclusion that the *Freedman* safeguards—including

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[7] The district court relied on *FW/PBS,* however, to support its conclusion that the ordinance, which it considered a "non-censorship licensing scheme," need not satisfy the third safeguard imposing the burden of proof on the decisionmaker to seek judicial review. 32 F. Supp. 2d at 1326. As explained below, we believe that all three *Freedman* safeguards should apply in this context.

the one requiring a regulator to "go to court" before withholding a permit to speak—apply to such licensing schemes and every reason to reaffirm it. First and foremost, the governmental justification for a prior restraint on speech where there is no need to mediate conflicts regarding the time, place, and manner of expression, is considerably weaker than in the setting of a public park or street. Whereas it may be impossible to hold two rallies in the same park on the same day, there is no evident limitation on the number of canvassers who may solicit funds door-to-door, or on the number of pieces of mail containing charitable solicitations that may be delivered.

To be sure, this Court has acknowledged that a state may protect its citizens from fraudulent solicitation by requiring "a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Cantwell v. Connecticut,* 310 U.S. 296, 306 (1940). But there is a substantial difference between such a ministerial reporting requirement and the now-prevalent licensing regimes that permit public officials, in the exercise of broad discretion, to deny permits to engage in protected speech because a charity or professional fundraiser has failed to satisfy expansive and often vague permitting requirements. *See, e.g., Giani,* 199 F.3d at 1250-53 (invaliding various provisions of ordinance governing solicitation that conferred unbounded discretion on regulators); *Fernandes,* 663 F.2d at 628-33 (same); *Gospel Missions of America v. Bennett,* 951 F. Supp. 1429, 1443- 47 (C.D. Cal. 1997) (same).

Many of these charitable solicitation licensing schemes are rife with the potential for abuse and censorship based on the content of speech, for they often involve subtle and discretionary judgment calls regarding whether a charity or professional fundraiser has made, or will make, "misleading" solicitations, in contrast to the "comparably objective decisions on allocating public benefits" such as a park, school auditorium, or municipal theater. *Cf. National Endowment for*

the Arts v. Finley, 524 U.S. 569, 586 (1998). Indeed, it is not unusual for a jurisdiction, on the basis of a claimed (and legitimate) interest of preventing fraud and misrepresentation in solicitation, to require a charity wishing to engage in charitable solicitation to demand copies of proposed solicitations before issuing a permit. *See, e.g., Telco Communications, Inc. v. Carbaugh,* 885 F.2d 1225, 1232-34 (4th Cir. 1989) (striking down provision of Virginia charitable solicitation law that required the submission of scripts in advance of proposed oral solicitations); *Telco Communications, Inc. v. Barry,* 731 F. Supp. 670, 682-83 (D.N.J. 1990) (striking down New Jersey provision requiring filing of a copy of any oral solicitation prior to the solicitation).

What this Court has said about door-to-door canvassing, however, holds equally true for all communications that involve charitable solicitation, whether they be made in person, by telephone, or by mail:

> Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

Schneider v. New Jersey (Town of Irvington), 308 U.S. 147,

164 (1939). As the Court summed up: "To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees." *Id.* It is to obviate this risk of censorship that, at a bare minimum, the *Freedman* safeguards are required for these types of permitting schemes.

Second, applications for permission to demonstrate in the parks tend to involve one-time events (although that admittedly is not the case here). Other licensing systems, however, such as in the charitable solicitations and adult business contexts, frequently involve an initial application and then periodic—often annual—renewals. *See, e.g.,* Fla. Stat. ch. 496.405 (requiring charitable organizations to file an initial registration statement, and a renewal statement each year thereafter, with Florida regulators); *Nightclubs,* 202 F.3d at 887 (city ordinance required licenses for sexually oriented businesses to be renewed annually); *Famine Relief,* 905 F.2d at 749 (West Virginia law required annual registration for charitable organizations). These repeated renewals pose special dangers because they give licensing authorities the opportunity to punish speakers for viewpoints expressed since they received their initial permits.

This Court found the annual licensing requirement in *Plain Dealer* to be a particularly troubling feature of the Ohio newsrack regulation, noting that "[w]hile perhaps not as direct a threat to speech as a regulation allowing a licensor to view the actual content of the speech to be licensed or permitted, a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern." 486 U.S. at 760 (citations omitted); *see also Jones v. City of Opelika,* 316 U.S. 584, 615 n.5 (1942) (Murphy, J., dissenting) ("The uncontrolled power of revocation lodged with the local authorities is but the converse of the system of prior licensing struck down in Lovell v. Griffin . . . .") (citation omitted), *vacated,* 319 U.S. 103, 104 (1943) (per curiam) (adopting reasoning of dissenting opinions in 316 U.S. 584); *Graff v. City of Chicago,* 9 F.3d 1309, 1329 (7th Cir. 1993) (en banc)

(Flaum, J., concurring) (reasoning that the fact that the full range of discretionary criteria did not apply to renewals of newsstand licenses indicated "that the Ordinance neither was intended to promote nor in fact dangerously facilitates content discrimination in the licensing of newsstands"). The *Freedman* safeguards, again, are vital in this context to prevent public officials, faced with annual renewals from an unpopular nonprofit organization, from using discretionary licensing provisions as a pretext for disciplining the speaker for controversial speech.

Nor is there any reason to relieve officials of a duty to comply with the third *Freedman* safeguard—the burden of going to court and the burden of persuasion once in court—before they may deny a charitable solicitations permit. In suggesting that this safeguard was inapplicable to adult business licensing schemes, Justice O'Connor's opinion in *FW/PBS* cited both the ministerial nature of the licensing determination under the Dallas ordinance and, even more importantly, the adult business's strong financial incentive to pursue a license denial in court. 493 U.S. 229-30. These rationales have no more force in the context of a charitable solicitations licensing regime than they do with respect to parks. *See* Part I(B), *supra*. A nonprofit organization such as Public Citizen, which engages in direct mail charitable solicitation campaigns nationwide, has little financial incentive to challenge a denial of a license in most jurisdictions. Nor does a pamphleteer in an airport or a door-to-door peddler possess such an incentive. *Cf. Cannabis,* 231 F.3d at 774-75 (holding that nonprofit organization engaged in political speech had no financial incentive to challenge the city's denial of a street closing permit). Instead, a charity is likely to be intimidated into censoring its own speech rather than risk sanctions or injury to its reputation in the jurisdiction. *See Plain Dealer,* 486 U.S. at 757-58 (describing the risks of self-censorship). Such an organization is situated identically to a film distributor, who, as acknowledged in *Freedman,* may be "unwilling to accept the burdens and delays of litigation in a

particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country." 380 U.S. at 59.

Finally, the absoluteness of the prohibition on speech when a charitable organization is denied a license to engage in charitable solicitation distinguishes it from the denial of a permit to hold a rally or march in a parade. Whereas the petitioners here retain multiple other avenues to convey their message—and, indeed, the existence of "ample alternative channels for communication of the information" is a prerequisite for upholding any time, place, and manner restriction on such speech, *Clark v. Community Creative Non-Violence,* 468 U.S. 288, 293 (1984)—a charity denied a registration in a jurisdiction is completely silenced in that locality. That the organization has no meaningful alternative for getting out its message provides even further reason for this Court to require a prompt judicial *disposition* of any licensing issue in this context, rather than mere *access* to judicial review—a process that ordinarily takes months, if not years, and during which time the speaker has been silenced.

* * *

Although this case focuses on permission to use a park, there are numerous types of permitting schemes, many of which, such as charitable solicitation licensing regimes, do not involve a limited public resource or competition among speakers. These permitting schemes often present significant opportunities for official abuse, delay, and censorship based on the content of speech. The best way to obviate that risk is to require the full range of *Freedman* safeguards in all of these open-ended licensing settings.

CONCLUSION

For the foregoing reasons, Public Citizen respectfully urges the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAREN CRONK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

—v.—

CHICAGO PARK DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF MORALITY IN MEDIA, INC. AND NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Morality in Media, Inc. and the National Law Center for Children and Families as *amici curiae*, file this brief in support of the Respondent in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.[1] The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

Morality in Media is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of Morality in Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record Robin S. Whitehead of Morality in Media, Inc. and Co-Counsel Bruce A. Taylor of the National Law Center for Children and Families and no part of the brief was authored by any attorney for a party. No person or entity other than these *amici* made any monetary contribution to the preparation or submission of this brief. Rule 37(6).

Morality in Media has an interest in this case because it is frequently asked by law enforcement agencies, state legislatures, city councils, and private citizens for advice and guidance on methods to enforce and improve existing laws regulating the distribution of obscenity. Morality in Media recognizes this case to be a major precedent not only in the area of parade and rally permits but also in licensing of sexually oriented businesses.

Morality in Media has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001); *Ashcroft v. Free Speech Coalition*, No. 00-795 (2001); *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.*, No. 00-799 (2001); and *Ashcroft v. American Civil Liberties Union*, No. 00-1293 (2001).

National Law Center for Children and Families is a Virginia, non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries. The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and

dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses. NLC has filed numerous friend of the court briefs in this Court involving First Amendment issues, including: *Alexander v. United States*, 509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (public nudity ordinance); *United States v. Playboy*, 529 U.S. 803 (2000)(cable-porn signal bleed); *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001)(sexually oriented business licensing); and *Ashcroft v. Free Speech Coalition*, No. 00-795 (2001)(virtual child pornography).

NLC's Chief Counsel has also filed several briefs with this Court, including: *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (obscenity nuisance); *California v. Freeman*, 488 U.S. 1311 (1989) (prostitution in pornography production); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (RICO-obscenity); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (sexually oriented business regulation); *Reno v. ACLU*, 521 U.S. 844 (1997) (*Brief for Members of Congress* re: CDA), and presented oral argument to this Court in *Flynt v. Ohio*, 451 U.S. 619 (1981).

Amici are filing this brief in support of the Respondent because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties or otherwise considered by the Court.

SUMMARY OF ARGUMENT

Rally permits are properly analyzed under *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Justice O'Connor in *FW/PBS* reduced the procedural safeguard concerning prompt judicial review as was previously required in *Freedman v. Maryland*, 380 U.S. 51 (1965). The *FW/PBS* Court distinguished licensing schemes from censorship schemes which require expedited review because those schemes involve regulations of speech where state officials had the ability to pass judgment on the content of speech. A permit ordinance for a rally if judged by *FW/PBS* standards need only provide for the "availability" of prompt judicial review.

Amici submit that a local permit or licensing ordinance cannot mandate that judicial review be completed within a certain time. This is so because a city or county council does not have the sovereign power to determine the jurisdiction of state trial courts or those above them and cannot set procedures for those courts that will hear appeals from the local government's administrative decisions. Local legislative bodies have no authority to order a state court to afford any particular degree of promptitude. *Amici* submit that prompt access to judicial review by a state court of general jurisdiction is what is required by *FW/PBS, Inc. v. City of Dallas*.

Finally, if the Honorable Court holds that *FW/PBS* requires a prompt judicial resolution, then the Court should announce a rule of procedural due process for the lower courts, setting a standard that is binding on the administration of the courts and requires the reviewing judges to dispose of appeals from local administrative decisions in a timely fashion. Such supervision of the administration of justice protects the rights of all the parties without striking local ordinances or requiring the enactment of new state statutes.

ARGUMENT

I. A PROMPT JUDICIAL RESOLUTION OF JUDICIAL CHALLENGES TO RALLY PERMIT DENIALS IS NOT REQUIRED BY *FW/PBS, INC. V. CITY OF DALLAS*.

An intentional prior restraint, in which government officials exercise substantial discretion to suppress speech they dislike, will be subjected to rigorous procedural requirements. *Freedman v. Maryland*, 380 U.S. 51 (1965). However, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), the Court distinguished the procedural requirements for licensing sexually oriented businesses. *Amici* submit that *Freedman*'s safeguard, requiring that a censorship scheme assure a prompt final judicial decision was not required by *FW/PBS* for a licensing code, which must provide only for the "possibility of prompt judicial review," "an avenue for prompt judicial review," and "the availability of prompt judicial review." *Id.*, 493 U.S. at 228, 229, 230.

In *FW/PBS*, licensing codes were distinguished from censorship schemes requiring expedited review because censorial schemes involve regulations of speech that are "presumptively invalid." *Id.*, 493 U.S. at 229 (O'Connor, Justice). Most notably, those schemes involved intentional censorship, where state officials had the ability to pass judgment on the actual content of the speech. Such restrictions present a particular danger of permitting the suppression of speech by officials because they disapprove of the ideas expressed. The Court in *FW/PBS* distinguished the rule for licensing: "Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.*

Amici agree with the Court of Appeals below in finding that the challenged rally permit regulation "does not authorize any judgment about the content of any speeches or other expressive activity--their dangerousness, offensiveness, immorality, and so forth." *Thomas v. Chicago Park District*, 227 F.3d 921, 924 (7th Cir. 2000). As such, the Seventh Circuit properly concluded that a mandate for a time limit on the judicial review was not warranted.

II. MERELY BECAUSE A RALLY SITUATION INVOLVES A PUBLIC FORUM DOES NOT REQUIRE THAT PRIOR FRAUDULENT REPRESENTATIONS IN APPLICATIONS BE OVERLOOKED

The Court below was correct in upholding the various grounds for denying a rally permit, specifically the regulation authorizing a denial where the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of any event or activity previously permitted." *Thomas*, 227 F.3d at 925.

Support for this determination is found in the Fifth Circuit opinion in *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, at 1304 (5th Cir. 1988), where the Court of Appeals rejected a sexually oriented business's attack on the city ordinance provision that allowed denial of licenses to persons convicted of certain crimes. The Fifth Circuit recognized that this provision of the ordinance did not simply regulate the manner of protected activity, but rather denied the right of persons convicted of certain crimes to engage in the regulated businesses, holding that: "While compelling necessity might be a proper standard to measure regulation disabling a person with full participatory rights of citizenship, on balance we are persuaded that only a substantial relationship need be shown between the conviction and evil sought to be prevented." *Id.* at 1305.

Amici submit that the mere fact a public forum exists in the instant case does not entitle a violator of past permit requirements to receive a rally permit.

III. A LOCAL LICENSING ORDINANCE CAN ONLY PROVIDE FOR THE AVAILABILITY OF PROMPT JUDICIAL REVIEW, IT CANNOT REQUIRE THAT REVIEW BE COMPLETED WITHIN A CERTAIN TIME

Cities and Counties can comply with this Court's statement of the need for speedy disposition of municipal or county administration of license applications and enforcement, with the possibility of prompt judicial review of those decisions, as stated in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990), by providing prompt procedural requirements in their ordinances to govern their internal administrative actions. The city and county councils can provide that an applicant or licensee can appeal a denial to the superior courts. Local legislative bodies cannot, however, dictate speedy resolution time limits within which the reviewing courts must dispose of their judicial review of the local government's decisions to grant, deny, suspend, or revoke a license.

In *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994), a news vendor challenged the constitutionality of an Illinois ordinance governing the licensing of city newsstands. Under the ordinance, within a specified period after denial of a permit, an appeal to the commissioner of transportation could be made. There was no provision mandating that the judiciary review a decision on a permit. The Seventh Circuit, in holding that the procedural safeguards were sufficient despite the lack of any explicit provision requiring judicial review, found the availability of the state's common law writ of certiorari to provide an aggrieved party with an adequate means of judicial review. *Id.* at 1325.

In *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870 (Wis. App. 2000), *writ dismissed as moot after argument*, 121 S.Ct. 743 (2001), the Wisconsin Court of Appeals recognized the dilemma involved in a city's inability to dictate a speedy resolution and stated at 882:

> While a local governing body can pass an ordinance directing judicial review within a short period of time, we doubt that it can also require a court to make a complete and final judicial review on the merits within a specified time period.

See also *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000) ("A municipality has no authority to control the period of time in which a state court will adjudicate a matter").

In *Books, Inc. v. Pottawattamie County*, 978 F.Supp. 1247 (S.D. Iowa, 1997) a district court also recognized this problem, stating at 1255, n. 7:

> There is no provision, however engineered, that allows a County to force a final determination by its state or federal courts. Such a provision would be beyond a county's power. It is not clear what, if anything, the *FW/PBS* Court meant by concluding the requirement of "prompt judicial review" in a municipal ordinance. This court finds those courts' reasoning which would require a county to attempt the impossible, namely forcing a state or federal court to decide, to be unreasonable and unpersuasive.

Amici maintain that an untenable situation would arise if the courts hold that a final determination on the

merits is required in order to insure the availability of prompt judicial review of First Amendment considerations. In addition to the inability of municipalities to comply with such an interpretation, because they cannot order a state court to afford a prompt resolution, this problem is further complicated by the reality that the various States already have statutory mechanisms to provide judicial review of administrative determinations that do not provide for any specific degree of promptitude.

To avoid this dilemma, your *amici* suggest that the language on prompt judicial review in *FW/PBS* be found to mean prompt access to judicial review, rather than final judicial determination, as satisfying the requirement for prompt judicial review.

IV. THE SEVENTH CIRCUIT CORRECTLY HELD THAT RALLY PERMITS DO NOT INVOLVE CENSORSHIP SCHEMES

The Court of Appeals below found that the regulation at issue "does not authorize any judgment about the content of any speeches or other expressive activity-their dangerousness, offensiveness, immorality, and so forth." *Thomas*, 227 F.3d at 924. The Seventh Circuit distinguished this rally regulation, as being content-neutral, from sexually oriented business licensing, as being "quasi-censorship," as justification for holding that "a more relaxed attitude toward the pace of judicial review is warranted," in opposition to other court decisions that have required the "deadlining" of prompt judicial review. Specifically, the Court of Appeals stated at 927:

> They are based on Supreme Court cases involving censorship, such as the *Freedman* case cited earlier, or quasi-censorship, such as the ordinance at issue in *FW/PBS, Inc. v. City of*

> *Dallas*, *supra*, which required the licensing of such businesses. The government's evident concern with the content of the "speech" disseminated by such businesses argues for greater judicial vigilance than in time, place, and manner cases, in which our rejection of deadlining in *Graff*, 9 F.3d at 1324-25, stands uncontradicted.

While *amici* reject the label of "quasi-censorship" for sexually oriented business license ordinances, we do agree that content regulation is not at issue in the case under consideration and that the procedural requirements of *Freedman* should be relaxed, even if it requires that a rally be held at another time or date so that an avenue to obtain judicial review may be followed.

The Court of Appeals in the instant case applied the constitutional framework set forth in *FW/PBS* and correctly held that the ordinance does not prevent prompt judicial review by state or federal courts, which is consistent with the plurality in *FW/PBS*, 493 U.S. at 227-28. The Seventh Circuit stated at 927:

> If a person denied a permit for reasons that he believes violate the First Amendment is dissatisfied with a paper record reviewed in state court by means of common law certiorari, he has only to bring a suit in federal district court and if the matter is urgent to seek as these plaintiffs' predecessor (the deceased MacDonald) did a preliminary injunction... Given that the plaintiffs have two remedies, one in state court and the other in federal court, the possible inadequacies of the state remedy, inadequacies in any event balanced by the

> expedition that barring oral testimony permits, are trivial.

See also *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d at 882, where the Wisconsin Court of Appeals held that "the City's ordinance will be upheld as long as expeditious judicial review is available."[2]

In *TK's Video Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994), a pornography book and video store brought an action challenging the county's licensing requirements for "adult businesses." Under the statute, a rejected license applicant could seek review within thirty days before the order became final. The Court of Appeals for the Fifth Circuit upheld the ordinance's provisions regarding judicial review, stating at 709:

> Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some

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[2]Cases not mandating time limits for a decision include: *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993) (finding the *FW/PBS* standards were met where denied applicant could file appeal pursuant to general Massachusetts procedures for informal review of agency decisions), and *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994), in support of its interpretation. *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir. 1994) (finding requirement for expeditious judicial review satisfied where unsuccessful licensing applicant can immediately challenge the regulatory decision in court and request a TRO to prevent closing a business), and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). *See also O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990)(declining to apply *FW/PBS* safeguards where it found adult entertainment licensing scheme imposed no restraint and where plaintiff theater was closed because of significant number of acts of public indecency).

> uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A "brief period" within which all judicial avenues are exhausted would be an oxymoron.

In *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), the Eleventh Circuit agreed with the First, Fifth, and Seventh Circuits in holding that this Court's requirement of the "possibility of" prompt judicial review is satisfied with access to judicial review. After reviewing the split in the Circuits, the Court of Appeals concluded at 1256:

> Boss Capital makes a good argument that *Freedman* requires prompt judicial resolution of censorship decisions, but in the end we conclude that access to prompt judicial review is sufficient for licensing decisions. *Freedman* itself unmistakably requires "a prompt judicial decision"...Still, none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment establishments. Instead they involved censorship.

Amici assert that it was not the intention in *FW/PBS* to require a prompt judicial decision in situations where municipalities provide for the type of judicial review allowable within their limited powers. For this Court to hold otherwise would be to invalidate municipal ordinances solely due to the time frames for that particular locale's judicial review procedures. This could lead to arbitrary and inconsistent decisions by the Circuit courts because of the different procedures of the various state court systems within their jurisdiction.

In *Gasparo v. City of New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998), the City successfully argued that sufficient judicial review is provided by the availability of a proceeding pursuant to Article 78 of New York's Civil Procedure Law. This type of proceeding is a form of action that provides the relief that was previously obtained by writs of *certiorari*, *mandamus*, and prohibition. The District Court noted that neither Supreme Court nor Second Circuit case law had addressed whether an action brought pursuant to Article 78 is sufficient to satisfy the requirements noted in *FW/PBS*.

The *Gasparo* Court, in upholding the judicial review procedure as adequate, looked to the Seventh Circuit decision in *Graff v. City of Chicago*, *supra*, finding the statutory schemes to be virtually identical and agreed, stating, 16 F.Supp.2d at 212:

> ... a majority of judges in *Graff* concluded--though for different reasons--that the availability of a *certiorari* action constituted sufficiently prompt judicial review. The five judge plurality in *Graff* held that because an unsuccessful applicant for a permit could obtain judicial review through the common law writ of *certiorari* and could raise his constitutional claims through that mechanism, judicial review was available for the purposes of the First Amendment.

Your *amici* assert that the Seventh Circuit Court of Appeals, along with the First, Fifth, Seventh, and Eleventh Circuits, are correct in holding that the appropriate standard to be applied, with respect to judicial review of rally permit denials and sexually oriented business license denials, is that of access to prompt judicial review, not the additional requirement of a mandated judicial decision. A true

censorship scheme would still be subject to a prompt decision, as established by *Freedman v. Maryland*, 380 U.S. 51 (1965). Unlike censors, who pass judgment on the content of expression, licensing officials look at technical and ministerial facts in deciding whether to issue a license. *See FW/PBS*, 493 U.S. at 229. Thus, licensing decisions are different and *amici* agree with *Boss Capitol* where that court stated: "We believe this is a situation for 'treating unlike things differently according to their differences.'" *Id.* at 1256.

V. IF THIS COURT DETERMINES THAT PROMPT JUDICIAL RESOLUTION IS REQUIRED FOR RALLY PERMITS, THE QUESTION AS TO WHETHER IT IS ALSO REQUIRED IN SEXUALLY ORIENTED BUSINESS LICENSING SHOULD BE DISTINGUISHED

In *FW/PBS* this Court justified the more narrowly defined scope of procedural safeguards because the dangers of a censorship system were not present in the licensing code. The plurality explained that a licensing scheme does not require individuals to judge the content of the speech. Instead, "the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." 493 U.S. at 229 (O'Connor, Justice). *See also Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 641 (4th Cir. 1999) ("...permitting schemes like Raleigh's do not directly regulate content...They are a far cry from the censorship scheme present in *Freedman.*"), and *Ward v. County of Orange*, 217 F.3d 1350, 1355, (11th Cir. 2000) ("Once again, it is important to stress the differences between censorship schemes and licensing schemes--'the dangers of censorship are less threatening when it comes to licensing schemes.'")

Where a licensing code regulates both speech and non-speech elements alike, extraordinary procedural

protections are not warranted. This Court has allowed state governments greater latitude in regulating "speech plus conduct" than in regulating "pure speech." *United States v. O'Brien*, 391 U.S. 367, 376 (1968), *quoted in FW/PBS*, 493 U.S. at 244. A sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.

Amici maintain that there is a distinction between censorship schemes that involve decisions based on the content of expression and sexually oriented business licensing codes, which involve substantial government interests, such as preserving the public welfare and preventing violations of public health and safety regulations. These substantial interests include: monitoring of businesses for violations of building codes; zoning and interior configuration requirements; monitoring employees for criminal sexual offenses; protecting minors from access to or employment in sexually oriented businesses; deterring infiltration of organized crime; and preventing recidivism by those convicted of sex-related crimes.

In holding that prompt judicial review means prompt "access" to judicial review, the First, Fifth, Seventh and Eleventh Circuits have given implicit recognition to the application of secondary effects analysis in the context of sexually oriented business licensing. By allowing municipalities to license nude exploitation and hard-core pornography businesses based on the general qualifications of an applicant, those courts recognize that local governments have a substantial interest in preventing crime and urban blight through the use of licensing laws. *See Boss Capital v. City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999) ("Licensing officials do not pass judgment 'on the content of any protected speech'; rather, they look at 'the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.'")

The additional requirement of securing a prompt judicial decision is not imposed by *FW/PBS* and is unnecessary in the absence of direct prior restraint of speech. The distinction between prior restraint censorship and applicant licensing requires that municipalities must only provide prompt access to judicial review for rally permit and sexually oriented business license decisions.

Amici also submit that, even if the *Freedman* prompt judicial determination requirement is applicable to rally permits which involve political speech, this should not apply to sexually oriented businesses licensing, which involve speech of lower societal import and less constitutional protection. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (Nude dancing is at the "outer perimeters of the First Amendment, though we view it as only marginally so.") As compared to *Connick v. Myers*, 461 U.S. 138 (1983) ("Speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection.")

VI. If This Court Concludes that Prompt Judicial Review Mandates a Prompt Resolution, *Amici* Urge this Court to Implement a Rule of Procedural Due Process to Instruct Courts How to Hear and Dispose of These Appeals or Judicial Reviews in a Prompt and Expedited Manner

As noted above, if this Court determines that a prompt judicial decision is required to satisfy procedural safeguards for rally permits, and if this rule is not distinguished or excluded from licensing sexually oriented businesses, this decision will pose great problems for municipalities. *See Nightclubs, Inc. v. City of Paducah, supra.* It would be an untenable exercise of the supervisory powers of the Court to announce a judicially imposed rule of

procedure that cannot be accommodated by municipalities. A procedural rule should be directed to the courts hearing the judicial review, without striking the ordinance on its face.

In the event this Court determines that a specific time period is required, your *amici* submit that this Court can instruct the state and federal courts how they must proceed and could comply, so that municipal ordinances can be administered and reviewed expeditiously and as applied, without facial invalidation.

The most effective and least burdensome proposition would be for this Court to implement a rule of procedural due process that would require state courts to render a speedy ruling within a time period this Court determines to be a reasonable time. This would significantly aid municipalities and relieve them of the onerous burden of having to forgo enacting and enforcing local regulations until a state legislature either amends an existing statute or adopts a new one. This method of construing existing laws to provide procedural due process was adopted by this Court in providing a time limitation for obscenity cases under the Customs forfeiture statute. In *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971), this Court held:

> Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seen undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe Sec. 1305(a) to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their

forfeiture and no longer than 60 days from the filing of the action to final decision in the district court.

This rule of judicial administration was also followed in *Gasparo*, 16 F.Supp.2d at 210.

As a matter of constitutional law, this Court could instruct state courts to provide an assurance of procedural due process by hearing and disposing of these appeals or judicial reviews in a prompt and expedited manner. This Court could impose specific time limits such as sixty, ninety, or 120 days, if necessary, in order to guide the lower state courts. *Thirty-Seven Photographs*, *supra* at 373-74.

Amici assert that, as with the *Miranda* warnings, no state statute was required to impose the rule of *Miranda* which dictated that the police must read the *Miranda* rights to an arrested defendant. *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, every state and federal court knew on and after the *Miranda* decision that the failure to read a defendant his rights would require those courts to suppress evidence or confessions or otherwise provide an exclusionary rule in order to provide the procedural due process afforded under the Fifth Amendment.

In the First Amendment area, this Court also imposed a warrant requirement that is not necessary in other Fourth Amendment situations. That rule is self-executing, however, and every state and federal court and law enforcement official knows from this Court's decisions that a search warrant is required of them to provide such procedural due process. *Roaden v. Kentucky*, 413 U.S. 496 (1973), and *Heller v. New York*, 413 U.S. 483 (1973). *See also New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986). *But see*, when the procedures are not properly followed, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

A court's duty to insure proper procedural due process is a matter of the administration of justice and the supervision of the courts, and need not involve the imposition of statutory procedures by the state legislatures nor the Congress. Although the State could impose specific time limits and procedural mandates by statute or by codification of procedural court rules, nothing in the Constitution nor the decisions of this Court should or need require them to do so. Some state legislatures have elected to do so in light of the federal decisions holding municipal ordinances or state statues unconstitutional. *See Baby Tam v. City of Las Vegas*, 199 F.3d 1111, (9th Cir. 2000) (The State amended the Nevada Revised Statutes and the local court's rules of practice to specify prompt judicial resolution of claims of prior restraint). *See also*, *Cal. Code of Civ. P.* Sec. 1094.8 requiring a prompt judicial decision in cases alleging prior restraint of speech or expressive conduct, and *Tenn. Code Ann.* Sect. 7-51-1110(d) providing for prompt decision.

However, if the federal courts had judicially declared the need for judicial promptness in rendering a decision as a matter of procedural due process, then state courts could have authoritatively construed existing statutes and ordinances and provided adequate procedural due process, without infringing on the rights of the states to administer their laws and without having had the federal courts enjoin or otherwise declare those state laws facially unconstitutional.

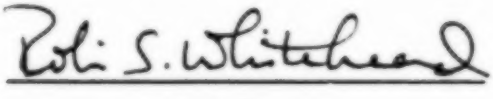
Without the Court's instruction as to the meaning of a prompt judicial determination, if that is what is held is to be required, questions will remain concerning the extent to which a judicial process must be completed before the time period becomes unreasonable. For instance, would "determination" require that an ordinance provide for completion of review at both the trial and appellate levels, or is an initial judicial determination sufficient? Likewise, is it sufficient that there is the availability of the right to ask the

reviewing court for a temporary restraining order to provide a judicial means of insuring the lack of restraint pending review or appeal? As the Fifth Circuit noted in *TK's Video*, to require that "all judicial avenues be exhausted would be an oxymoron" 24 F.3d at 709, and may be inconsistent with *Freedman*, 380 U.S. at 60, that review be provided in a manner "compatible with sound judicial resolution." Any announcement of a rule of procedural due process should be directed at the courts, without the need to strike city or county ordinances or enact new state statutes.

CONCLUSION

For all of the above reasons, your *amici* pray that this Honorable Court affirm the judgment of the court below and declare the Chicago Park District's ordinance governing the issuance of permits for use of its parks as constitutional in that it properly provides for "a more relaxed attitude toward the pace of judicial review" as required by this Court in *FW/PBS, Inc. v. City of Dallas*.

Respectfully submitted,



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SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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CAREN CRANK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

-v.-

CHICAGO PARK DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CITY OF NEW YORK, IN SUPPORT OF RESPONDENT

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No. 00-1249

IN THE
SUPREME COURT OF THE UNITED STATES

CAREN CRANK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

-v.-

CHICAGO PARK DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CITY OF NEW YORK, IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICUS CURIAE*

The City of New York ("the City") respectfully submits this brief in support of affirmance of the judgment of the United States Court of Appeals for the Seventh Circuit in Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir.), reh'g and reh'g en banc denied, 2000 U.S. App. Lexis 28935 (7th Cir. 2000), cert. granted, __U.S.__, 121 S.Ct. 2191 (2001).[1]

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[1] Pursuant to Rule 37.6 of this Court, the *amicus curiae* represents that counsel for *amicus* authored this brief in its entirety and that no person or entity other than the *amicus* and its representatives made

The City has significant interests in this case, involving the constitutionality of permit regulations governing the use of parks and public spaces for demonstrations, rallies, and special events. The City of New York, through its Department of Parks and Recreation (the "Parks Department"), like the respondent Chicago Park District in the case at bar, has promulgated rules and regulations governing the use of the City's parks for special events or demonstrations. See Title 56 of the Rules of the City of New York ("RCNY"), § 1-01 et seq., as amended effective December 29, 1999. The regulations, inter alia, require permits for large assemblies (where 20 or more people are expected to attend) in New York City parks, in order to protect the public's use and enjoyment of the park, prevent the simultaneous use of a park by two groups, prevent chaos and disorder, and provide the City with advance notice so as to allow any needed alterations or supplementation of police, sanitation, emergency, health, or transportation services.

The regulations set time frames for submitting, processing, and responding to permit applications, 56 RCNY § 2-08(b); and enumerate five bases for denying a permit, 56 RCNY § 2-08(c). In the event that a permit is denied, the Parks Department is mandated to "employ reasonable efforts to offer the applicant suitable alternative locations and/or times and/or dates for the proposed event." 56 RCNY § 2-08(d). With respect to each of these bases for denial, the Parks Department makes reasonable efforts to accommodate an applicant at another suitable park site. These regulations are thus similar to those of the Chicago Park District at issue in the case at bar. See Chi. Park Dist. Code ch. VII § C(5)(e). The regulations are applied in an even-handed manner, based upon, inter alia, conflicts among permit applications for competing uses, or the effect of the proposed event on the park and surrounding area, or other objective content-neutral factors, rather than upon the message or viewpoint communicated at the event, or the content of the applicant's speech. The Parks Department has often denied permits to applicants with noncontroversial messages, due to the unsuitability of a particular location for the planned event, or its negative impact on others.

The denial of a permit application may be administratively appealed to the agency's designated appeals officer, and such appeal is subject to reasonable time limitations for both the applicant to file the appeal, and for the Parks Department to render a decision on the appeal. 56 RCNY § 2-08(e). New York City's permit requirements for holding demonstrations and special events in the City's parks are therefore similar to those of the Chicago Park District, which the Seventh Circuit upheld in the case at bar. See Chi. Park Dist. Code ch. VII, § C(6).

The Parks Department receives well over 2,000 special event permit applications per year. The Parks Department traditionally grants numerous permits for applicants engaging in First Amendment activities. Many of the applications granted for First Amendment activities communicate messages that some might deem controversial, but the applications are granted without regard to content or viewpoint. However, in many instances, applicants are requested to select another date and/or park location, due to prior requests by other applicants, the unsuitability of the location requested for the event, and/or unreasonable interference with use of the park by others.

For several years, various organizations apparently affiliated with the plaintiffs in the instant case, including but not limited to Cures Not Wars, Harm Reduction Coalition,

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any monetary contribution to the preparation or submission of this brief.

Fifth Avenue Pot Parade, Fifth Avenue Peace Parade, African Descendants Awareness Movement, Black Coalition on Drugs, End of the Drugs War Coalition, and Marijuana Day Parade, held a parade down Fifth Avenue in New York City, with a rally ending in Washington Square Park. Historically, this parade/rally has been held on the first Saturday in May. Different groups have marched different routes in different years for the parade portion of the event. In the mid 1990's, the May rally had caused increasing damage each year in Washington Square Park. As a result of the extensive damage and disruption that these rallies caused to Washington Square Park and the surrounding neighborhood, the Parks Department restricted the time and place of these events from year to year based on the unsuitability of various rally sites requested by these organizations. These restrictions imposed by the Parks Department have resulted in numerous lawsuits challenging the constitutionality of these restrictions. See, e.g., Harm Reduction Coalition v. Bratton, 1995 U.S. Dist. Lexis 6192 (S.D.N.Y. May 5, 1995); Cures Not Wars Coalition v. Stern, 96 Civ. 3139 (S.D.N.Y. 1996); Cures Not Wars Coalition v. Stern, Index No. 106972/97 (Sup. Ct. N.Y. County 1997).

Thereafter, in Beal and MacDonald v. Stern, 184 F.3d 117 (2d Cir. 1999), upon which petitioners herein rely (see Pet.'s Br. at 24), the United States Court of Appeals for the Second Circuit considered the plaintiffs' claims, on their appeal from the denial of a preliminary injunction, that the Parks Department's rules that were then in effect constituted a facially unconstitutional prior restraint on speech, and vested the Commissioner with unconstitutionally excessive discretion to grant or deny permits. Id. at 120, 122. The Second Circuit disagreed with the District Court's conclusion that the challenged regulations were content-neutral time, place and manner restrictions, finding instead that the rules constituted a prior restraint on speech because they conditioned the exercise of expressive activity on obtaining a

Parks Department permit. Id. at 124. In ruling that the regulations were a content-neutral prior restraint on speech, the Second Circuit determined that the challenged regulations needed to comply with only the first two procedural safeguards set forth in Freedman v. Maryland, 380 U.S. 51 (1965). Beal, 184 F.3d at 127-28, citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 229 (1990). The Second Circuit observed, inter alia, that "prompt access to judicial review in state courts would satisfy Freedman," and that there was some evidence in the record that such access was available, which would conceivably satisfy the second Freedman factor. Id. at 129. The Second Circuit, however, without expressing any opinion as to the facial validity of the rules under the First Amendment, remanded the case to the District Court for "amplification of the record" with evidence of the Parks Department's practices with respect to time limits on determining permit applications, and the availability of prompt judicial review. Id. at 129, 130.[2]

Some of these same plaintiffs similarly challenged, in both the Second and Seventh Circuits, the regulatory scheme governing the issuance of permits for parades and processions. See MacDonald v. Safir, 206 F.3d 183 (2d Cir. 2000), and MacDonald v. City of Chicago, 243 F.3d 1021 (7th Cir.), petition for cert. filed, __U.S.__ (June 11, 2001).

In MacDonald v. Safir, 206 F.3d 183, 186 (2d Cir. 2000), one of the plaintiffs in Beal challenged the facial constitutionality of New York City's parade permit

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[2] On March 27, 2001, a stipulation and order was entered in Beal and MacDonald v. Stern, withdrawing the case as moot in light of the amended Parks Department regulations, but leaving open the issue of attorneys' fees, and the possibility of a subsequent constitutional challenge to 56 RCNY § 2-08.

regulations, principally codified in New York City Administrative Code ("Admin. Code") § 10-110, and the Police Department's regulatory scheme governing the issuance of parade permits.[3] As in Beal, the Second Circuit, concluding that the parade permitting statute, Admin. Code § 10-110, constitutes a prior restraint on speech, remanded the case back to the District Court for further proceedings. Id. at 186, 190, 194. In finding that the ordinance was not sufficiently precise on its face to pass constitutional muster, the Court remanded the case to the District Court for submission of further evidence regarding the Police Commissioner's practices and guidelines with respect to issuing parade permits under Admin. Code § 10-110, to determine if the ordinance violated the First Amendment. Id. at 193.

The Second Circuit also remanded the case to the District Court for more evidence on whether the ordinance provides the necessary procedural safeguards required for prior restraints on speech, concluding that Admin. Code § 10-110 is a prior restraint on speech because one must obtain a permit before staging a parade in New York City. Id. at 194. With respect to the second Freedman safeguard requiring the availability of expeditious judicial review, the Court did not

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[3] On or about June 27, 2001, the City of New York, through its Police Department, promulgated Rules for Processions and Parades, in 38 RCNY §§ 19-01 through 19-04, which became effective on July 27, 2001. These regulations, inter alia, set forth procedures and time limits for filing and determining parade permit applications, and administrative appeals from permit denials. 38 RCNY §§ 19-03, 19-04. Specific guidelines and procedures for processing parade permit applications were also set forth in New York City Police Department Administrative Guide Procedure No. 321-14. These procedures are being revised to reflect the newly enacted regulations.

evaluate whether New York Civil Practice Law and Rules ("N.Y.C.P.L.R.") Article 78 proceedings[4] adequately satisfied that requirement, noting the limited evidence before it on that issue. Id. at 194-95. The Court further opined that if the Police Commissioner does not exercise discretion by passing judgment on the content of any protected speech, but only reviews general qualifications of each applicant, as a ministerial action, there may be no need for the Commissioner to bear the burden of going to court when a permit is denied. Id. at 195. The Second Circuit also remanded that claim for further fact-finding and evidence regarding the Commissioner's discretion in that regard under the ordinance. Id. The MacDonald case is still pending in the District Court, following the Second Circuit's remand.

Conversely, in MacDonald v. City of Chicago, 243 F.3d 1021, 1036 (7th Cir.), petition for cert. filed, __U.S.__ (June 11, 2001), the Seventh Circuit, applying the standard enunciated by this Court in Cox v. New Hampshire, 312 U.S. 569 (1941), concluded that Chicago's parade permitting ordinance was a content-neutral time, place and manner restriction, that was justified by its purpose, not its content; was narrowly tailored to serve a significant governmental interest; left open ample alternative channels of

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[4] The common-law writ of certiorari has been codified in New York State as a Civil Practice Law and Rules Article 78 proceeding. See N.Y.C.P.L.R. § 7801 et seq. ("Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained" in an Article 78 proceeding). An Article 78 proceeding is thus functionally similar to an action brought pursuant to the common law writ of certiorari, and provides an unsuccessful applicant with a forum in which to assert all constitutional challenges. Gasparo v. City of New York, 16 F. Supp. 2d 198, 211, 213 (E.D.N.Y. 1998); Graff v. City of Chicago, 9 F.3d 1309, 1325 (7th Cir. 1993) (en banc), cert. denied, 511 U.S. 1085 (1994).

communication; and did not vest the Commissioner with unfettered discretion or constitute an unconstitutional prior restraint on speech. As in Thomas, the Seventh Circuit in MacDonald rejected the plaintiffs' challenge to the constitutionality of the permit ordinance.

The City of New York thus has strong interests in this case, in light of the pending litigation in this jurisdiction, likewise involving some of the same plaintiffs and/or organizations, and similarly involving the constitutionality of the City's special event and parade permitting regulations, for demonstrations and special events in City parks, and parades and processions in City streets and roadways. The City of New York's special event and parade permit regulations are substantively and functionally similar in many relevant respects to those of the Chicago Park District that are being challenged in the case at bar, which the Seventh Circuit properly upheld as valid and constitutional. The City, like the Chicago Park District, has significant interests in reasonably regulating the time, place, and conduct of large special events in parks, and parades and processions in public streets, to avoid simultaneous incompatible events at the same location, as well as to minimize disruption, chaos, excessive noise, vehicular and pedestrian traffic hazards and obstructions, risk of injury to persons and damage to property, inconvenience to the neighboring community, and possible interference with the general public peace, safety and welfare. See New York City Charter § 533(a)(3); Administrative Code § 10-110; Title 38 RCNY §§ 19-01 et seq.; Title 56 RCNY §§ 1-01 et seq.

The City's permitting regulations and procedures, like those of the Chicago Park District, are content neutral and apply to all large public assemblies, with no consideration of the message or purpose of the group. They are narrowly tailored to meet the significant governmental interests in preserving City parks for legitimate park purposes, and offer alternative times or places if the special event applicant's

request is not feasible or available. The regulations do not vest unbridled discretion in the governmental agency, and are not an unconstitutional prior restraint of the content of any speech or message sought to be conveyed.

SUMMARY OF THE ARGUMENT

The Chicago Park District's special event permit regulations were properly upheld as valid time, place and manner restrictions. Unlike prior restraints, which are concerned with the content of the speech or message, and relate to censorship concerns, the regulations in issue do not forbid any speech, foreclose any communication, silence any speaker, or prohibit the dissemination of any message. Rather, the regulations impose a reasonable permit requirement for large special events in the city parks, simply narrowly regulating the time and place of the communication. The challenged ordinance does not authorize suppression of speech in advance of its communication, nor is it aimed at the suppression of speech because of its content.

The challenged regulations are content-neutral, in that they authorize denial of a permit on a variety of grounds that have nothing to do with the content of expressive activity; are narrowly tailored to serve significant governmental interests of park maintenance and preservation, and promoting public safety and convenience in encouraging the orderly use and enjoyment of whatever benefits the parks have to offer; and leave open ample alternative avenues of communication, by providing for alternative places and/or times for applicants who have been denied permits, thereby permitting expressive activity in the parks or elsewhere.

The permit regulations do not vest unbridled discretion in government officials, because they provide sufficiently objective identifiable standards, none of which are content-based, for the licensing authorities to apply in

determining whether to grant or deny a special event permit. The regulations contain narrow, objective and definite standards to guide the licensing authority, through application of uniform factors addressed to specific municipal interests, thereby avoiding the risk of censorship through use of unfettered discretion to deny permits as a means of suppressing a particular idea or viewpoint.

Even if the permitting regulations are analyzed as prior restraints, they are not unconstitutional, in that they provide for adequate procedural safeguards, by setting specific time periods within which the permit application must be granted or denied, and allowing for expeditious state court judicial review of that decision. Because the regulations in issue are not a censorship scheme, nor allow the city to pass judgment on the content of any protected speech, the licensor is not required to initiate court proceedings to justify a permit denial, or to bear the burden of proof in such proceeding. Rather, a limitation on the time to issue the permit, and the availability of prompt judicial review, satisfy Constitutional requirements.

ARGUMENT

POINT I

THE CHICAGO PARK DISTRICT'S PERMIT REGULATIONS WERE PROPERLY UPHELD AS REASONABLE AND VALID TIME, PLACE AND MANNER RESTRICTIONS, AND DO NOT CONSTITUTE PRIOR RESTRAINTS ON SPEECH.

The United States Court of Appeals for the Seventh Circuit properly upheld the constitutionality of the Chicago Park District's permit regulations as valid time, place and manner restrictions, rather than analyzing them as prior restraints. The Court correctly pointed out the "heterogeneity" of the prior restraint doctrine, noting that the "historical referent of 'prior restraints' is censorship, … which the administration of a park system does not much resemble." Thomas, 227 F.3d at 923-24. The Court in Thomas correctly observed that the challenged regulation does not authorize any judgment about the content of speeches or other expressive activity, nor does it even necessarily reduce the amount of speech. Id. Thus, the Chicago Park District's "regulation authorizes the denial of a permit on a variety of grounds, none of which has anything to do with the content of expressive activity." Id. at 924-25. Because the park permit ordinance does not concern itself with the content of the proposed speech, the Court in Thomas correctly treated the ordinance as a time, place and manner licensing system. Id. at 296; see also MacDonald v. City of Chicago, 243 F.3d at 1032 (in "a permit scheme which limits the discretion of the government based on content-neutral criteria … the threat of censorship characteristic of a prior restraint is remote"; the challenged ordinance does not prohibit anyone from marching and does

not restrict speech, but rather, regulates the time, place and manner of marches designed to present speech).

Recent decisions of this Court confirm that the permit regulations in issue are not "prior restraints." In Hill v Colorado, 530 U.S. 703 (2000), this Court construed a Colorado statute, which prohibited any person within 100 feet of a health care facility's entrance from knowingly approaching within eight feet of another person without that person's consent, in order to disseminate information or engage in oral protest, education or counseling, as a valid time, place and manner regulation that was content-neutral, narrowly tailored to serve significant and legitimate governmental interests, and left open ample alternative avenues of communication. Id. at 725-26. This Court rejected the petitioners' argument that the statute's consent requirement imposed an unconstitutional prior restraint on speech, noting that no channel of communication was foreclosed, no speaker was silenced, and no message was prohibited. Id. at 733-34. Rather than imposing a "heckler's veto," the statute allowed every speaker to freely engage in any form of expression communicating any message or viewpoint, narrowly restricting only the "place" of such communication. Id. at 734. This Court observed that concerns about "prior restraints" relate to restrictions imposed by "official censorship," and that this statute conferred no such broad censorial power on the pedestrian. Id. at 734 and n.43. Significantly, the ordinance did not restrict the content of any message that anyone might wish to communicate to anyone else, whether inside or outside the regulated areas. Id. at 708. Rather, the statute simply empowered citizens entering a health care facility to prevent a speaker, approaching from within eight feet, from communicating an unwanted message. Id. at 734. The law did not affect any other activity at any other location relating to any other person, and thus did not constitute an unlawful prior restraint. Id. at 734-35.

In Ward v. Rock Against Racism, 491 U.S. 781, 795 n.5 (1989), this Court rejected the dissent's suggestion that a sound amplification regulation for park events constituted a prior restraint, pointing out that the guideline granted no authority to forbid speech, but merely permitted the city to regulate volume to the extent necessary to avoid excessive noise. As the challenged sound amplification guideline did not authorize suppression of speech in advance of its expression, it did not constitute a prior restraint. Id., citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

Thus, the Chicago Park District's permit regulations were properly analyzed as a time, place and manner restriction, rather than as a prior restraint on speech. See Ward, 491 U.S. at 791; Madsen v. Women's Health Center Inc., 512 U.S. 753, 764 (1994) (the constitutionality of content-neutral, generally applicable statutes, as opposed to injunctive orders, is assessed under the standard set forth in Ward for a traditional public forum, requiring a determination of whether the time, place and manner regulations are narrowly tailored to serve a significant governmental interest); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (regulation forbidding sleeping in public parks was defensible as a time, place or manner restriction or as a regulation of symbolic conduct); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding law requiring the issuance of a special permit for marching in public streets, not as a prior restraint, but as reasonable regulation of time, place and manner relative to other proper street uses); see also Blue Canary Corporation v. City of Milwaukee, 251 F.3d 1121, 1123 (7th Cir. 2001) ("prior restraints" that do not censor the dissemination of purportedly dangerous or offensive ideas or opinions, such as permit requirements on the use of public parks and other public spaces for expressive uses, including entertainment and political demonstrations, "are reviewed under the much more permissive standard applicable to

restrictions merely on the time, place and manner of expression"); United States v. Kistner, 68 F.3d 218, 221 n.7 and 222 (8th Cir. 1995) (upholding regulation and policy statement requiring permit for the sale or distribution of noncommercial printed material within public park areas as a reasonable time, place, and manner restriction under the First Amendment); United States v. Sued, 143 F. Supp. 2d 346 (S.D.N.Y. 2001) (regulations prohibiting engaging in a demonstration at Statue of Liberty without a public assembly or printed matter permit constitute reasonable restrictions on the time, place and manner of First Amendment expression at Liberty Island, and constitute a reasonable accommodation to the needs of many different users of Liberty Island).

Traditionally, the types of ordinances that this Court has held to be unconstitutional prior restraints have specifically focused on the content of the permit applicant's speech as a basis for denial. This Court has thus required procedural safeguards for prior restraints primarily where the statutes or conduct in issue were, in fact, content-based. See, e.g., Freedman v. Maryland, 380 U.S. 51 (1965) (statute mandated criminal penalties for showing movie without prior approval by a board of censors); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (denial of a permit to operate a musical in a municipal facility based upon the board member's judgment that the musical's content was inappropriate, and not "clean and healthful and culturally uplifting," constituted a prior restraint); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969) (city commission's absolute authority to deny a permit for a demonstration, parade or procession based upon the commission's belief that the event would negatively impact the public welfare, peace, safety, health, decency, good order, morals or convenience of its citizens, deemed a prior restraint); Cantwell v. Connecticut, 310 U.S. 296 (1940) (act proscribing the solicitation of money or any valuable thing for any alleged religious, charitable or philanthropic cause unless cause was

approved by the secretary of the public welfare council constituted a prior restraint); Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988) (mayor's complete discretion in approving licenses for newsracks bases upon the terms and conditions deemed necessary and reasonable by the Mayor, constituted a prior restraint); Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 130, 133-34 (1992) (ordinance requiring permit and fee before authorizing public speaking, parades, or assemblies was a prior restraint on speech, where the ordinance allowed the possibility of censorship through uncontrolled discretion, by often requiring that the fee imposed be based upon the content of the speech, and such decision was "left to the whim of the administrator," without articulated standards or objective factors.); see also Blue Canary Corporation, 251 F.3d at 1123 (By 'prior restraint' Blackstone and modern courts alike mean censorship of the content of speech, which is an effort by administrative means to prevent the dissemination of ideas or opinions deemed to be dangerous or offensive); cf. 4 William Blackstone, Commentaries 151-52 (Tucker's Blackstone 1803).

Unlike the types of statutory schemes that have traditionally been deemed prior restraints, the regulatory provisions challenged by the plaintiffs in the instant case are not directed at the suppression of speech because of its content. The Chicago Park District's permitting scheme does not empower the Chicago Park District to appraise the content of the speech, exercise judgment, or form an opinion as to the message to be conveyed, as a basis for denying a permit. See Cantwell, 310 U.S. at 305.

As the Chicago Park District's permit regulations do not grant broad discretion to the permitting governmental officials and are content neutral, a licensing scheme that requires permits prior to organized expressive activity involving a large group of people in a public forum is not a

prior restraint. The municipality has a legitimate interest in protecting all individuals' use and enjoyment of its parks, avoiding the simultaneous use of the parks by two or more competing or incompatible groups, preventing chaos, disorder, and the risk of harm to people and property, and having notice in advance of an event so as to afford the government an opportunity for proper policing and other necessary services. See Clark, 468 U.S. at 293-98; Cox, 312 U.S. at 576; Ward, 481 U.S. 781.

Although plaintiffs' right to convey their message is certainly entitled to First Amendment protection, no constitutional right -- including those afforded by the First Amendment -- is absolute. The First Amendment does not guarantee the right to communicate one's views at all times and places, or in any manner that may be desired. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Oliveri v. Ward, 801 F.2d 602, 605 (2d Cir. 1986), cert. denied, 480 U.S. 917 (1987); Million Youth March, Inc. v. Safir, 155 F.3d 124, 125 (2d Cir. 1998) (plaintiff seeking permit is not entitled to have court order city to issue permit for the event "precisely as the plaintiff wishes to hold it"). Thus, as this Court has repeatedly held, "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward, 491 U.S. at 791; see also Clark v. Community for Creative Non-Violence, 468 U.S. at 293, 297 (prohibition against camping, with ban on sleeping in certain parks, as a protest against homelessness, is a reasonable time, place and manner regulation that withstands constitutional scrutiny); Forsyth County, 505 U.S. at 130 ("any permit scheme controlling the time, place, and manner of speech must not be based on the content of the

message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication").

The challenged regulations here are content neutral, narrowly tailored, and leave open ample alternative avenues of communication. The Seventh Circuit correctly ruled in the case at bar that the Chicago Park District's regulations are content-neutral, in that they authorize denial of a permit on a variety of grounds, none of which has anything to do with the content of expressive activity. See Chi. Park Dist. Code ch. VII, § C(5)(e). Thomas, 227 F.3d at 924. Since the Chicago Park District's regulations make no distinction based upon the message of the applicant, and are "justified without reference to the content of the regulated speech," see City of Renton v Playtime Theatres, Inc., 475 U.S. 41, 47 (1986), the permit requirements are content neutral. See Ward, 491 U.S. at 792. They place no restrictions on, and do not prohibit, either a particular viewpoint or any subject matter. See Hill v. Colorado, 530 U.S. at 723.

The regulations are also "narrowly tailored to serve a significant governmental interest." See Ward, 491 U.S. at 796; Clark, 468 U.S. at 293. The government clearly has a substantial interest in controlling the activity around certain public and private places. See Hill, 530 U.S. at 728. The government may act to protect traditional public forums such as city streets and parks, to further its "substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation." Ward, 491 U.S. at 796, 797, citing Clark, 468 U.S. at 296. The permitting regulation "narrowly focuses on the Government's substantial interest in maintaining the parks ... in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." Clark, 468 U.S. at 296. The Chicago Park District has a legitimate interest in ensuring that the parks within its

jurisdiction are adequately protected, see id. at 297, and its "interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective." Heffron, 452 U.S. at 650. Accord, Paulsen v. Gotbaum, 982 F.2d 825, 830 (2d Cir. 1992) (New York City park regulation limiting solicitation and leafletting to stationary area in park during a special event was upheld as a valid way to prevent litter, in light of "the substantial governmental interest in conserving parks"); United States v. Kistner, 68 F.3d at 221 (regulation requiring a permit for the distribution of printed matter had valid public purpose of avoiding overcrowding and overlapping activities, and preserving park facilities, resources, and the public peace and safety); ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 957, 958 (D.C. Cir. 1995) (upholding prohibition of sale of religious beads and audio tapes on National Mall, noting that Park Service was free to determine how much commercial activity to permit in area parks "without significant erosion of their fundamental [park] purposes" and "without the sacrifice of essential park values").

The regulations allow the government to take into account the interests of various permit applicants, as well as the competing interests of other park users who may not wish to participate in the special event, and who may wish to engage in quiet and peaceful enjoyment of the park setting, or neighbors and community members near the park who may be disturbed by the excessive disruption and noise generated by the event. This Court has held that a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986), and has characterized this interest as "important and substantial," Young v. American Mini Theatres, Inc., 427 U.S. 50, 80 (1976) (Powell, J., concurring), as is the government's interest in protecting its citizens from excessive noise, Ward, 491 U.S. at 797, and maintaining the parks in an attractive and intact

condition, Clark, 468 U.S. at 296. The validity of the regulations "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." Ward, 491 U.S. at 800 (citations omitted). The permit requirements must be assessed in light of the entire permitting scheme, and all the varied groups it regulates, and the regulation "is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the [regulation] than with it." See id. at 801. Thus, the narrow tailoring requirement is satisfied, where as here the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. at 799.

Finally, the regulations leave open ample alternative avenues of communication. The regulations do not attempt to ban any particular manner or type of expression at a particular place or time. See Ward, 491 U.S. at 802. The regulations permit expressive activity in the parks, and have no effect on the quantity or content of that expression, beyond reasonably restricting the time and place of the special event. See id. The regulations clearly provide for alternatives for an applicant whose permit has been denied. Specifically, Chicago Park District Code ch. VII, § C(5)(e) states that "[n]otice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit." In addition, where a prior permit application has been granted for a competing event, "the Park District shall propose an alternative place, if available for the same time, or an alternative time, if available for the same place." Id. The regulations in issue certainly leave open ample alternative channels of communication of any message sought to be

conveyed, whether in the city parks or elsewhere. See also Hill, 530 U.S. at 731, 734 (Colorado ordinance regulating speech-related conduct within 100 feet of the entrance of any health care facility did not "ban" any communication, but merely narrowly regulated the places where communications could occur); Ward, 491 U.S. at 799 n.7 (sound amplification guideline does not ban all concerts, or even all rock concerts, but instead eliminates excessive or inadequate sound amplification, without banning or restricting other speech); Clark, 468 U.S. at 295 (overnight sleeping prohibition in certain parks is a time, place or manner regulation which "neither attempts to ban sleeping generally nor to ban it everywhere in the parks"); Paulsen, 982 F.2d at 830 (rules did not bar soliciting or leafletting in parks, but simply restricted it to a certain area during a special event).

POINT II

THE PERMIT REGULATIONS DO NOT GIVE UNBRIDLED OR UNFETTERED DISCRETION TO THE LICENSING AUTHORITIES.

Petitioners contend that the permit regulations are facially invalid because they do not impose adequate standards, and grant too much discretion to the Chicago Park District to deny a permit, thereby posing the "danger of censorship" (Pet.'s Br. at 25-29, 40-44). The Seventh Circuit properly rejected this argument. The regulations do not vest undue discretion in the licensor because the regulations provide sufficiently objective standards for the licensing authorities to apply. While the standards are undoubtedly flexible, as the Seventh Circuit here recognized, and "the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Ward, 491 U.S. at 794, and cases cited therein. The

challenged regulations must be interpreted, by their own terms, to forbid municipal officials to deny a special event permit, or to fail to offer alternative times and/or locations, based on the message sought to be conveyed by the applicant. See Ward, 491 U.S. at 794-95. The regulations are thus not vulnerable to petitioners' facial challenge. See id. at 795.

This Court has reiterated that a licensing scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-26 (1990), citing Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988). A law which places time, place and manner restrictions on expressive activity through a licensing requirement must contain "narrow, objective, and definite standards to guide the licensing authority," to avoid the risk of censorship, through use of unfettered discretion as a means of suppressing a particular viewpoint. See Shuttlesworth, 394 U.S. at 150-51; Forsyth County, 505 U.S. at 130-31. A facial challenge will be upheld "whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." Lakewood, 486 U.S. at 759 (1988) (holding that a statute inadequately limited official discretion when the mayor was permitted to deny a license for "such other terms and conditions deemed necessary and reasonable by the Mayor"). In other words, a regulation that allows "arbitrary application" is "'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" Forsyth County, 505 U.S. at 130.

Permitting regulations such as those challenged here do not vest unfettered discretion in licensing authorities, because they require the application of uniform factors with reference to well-recognized municipal interests, such as park

preservation, public safety concerns, and the balancing of competing and simultaneous park uses and special events for the greatest public use and enjoyment, and the least disruption and interference with other park or neighborhood uses. Chicago Park District Code ch. VII, § C(5)(e)(1)-(11) contains ample specific and objective criteria for evaluating permit applications, thus effectively avoiding the problem of "unbridled discretion" that this Court condemned in Lakewood. See, also Shuttlesworth, 394 U.S. at 154-55 (statute in question was construed to include reasonable standards); Cox, 312 U.S. at 576 (upholding parade permitting scheme which gave the licensing board the power to investigate the application and revoke the license, but was silent as to the criteria governing the granting of permits); Ward, 491 U.S. at 793-94 (rejecting facial challenge to the Parks Department's Use Guidelines for sound amplification, and rejecting plaintiff's claim that the Use Guidelines vested "unbridled discretion" in the hands of the city officials); Graff v. City of Chicago, 9 F.3d 1309, 1317-18 (7th Cir. 1993) (en banc), cert. denied, 511 U.S. 1085 (1994) (city officials may constitutionally employ limited [but not unbridled] discretion when considering permit or license applications); United States v. Kistner, 68 F.3d at 221 (park permit regulation allowing consideration of effect on public health, safety and welfare did not vest unbridled discretion); Stonewall Union v. City of Columbus, 931 F.2d 1130, 1135 (6th Cir.), cert. denied, 502 U.S. 899 (1991) (eleven criteria regarding parade route and size to determine fee "constitute objective and definite standards related to traffic control to guide the licensing authority and prevent unfettered discretion"); Turley v. Police Department, 167 F.3d 757 (2d Cir. 1999) (upholding constitutionality of statute regulating sound amplification and use of sound devices in public places, concluding that the ordinance did not confer impermissible discretion on police officers to determine the maximum volume for sound permits, since the articulated guidelines and policies adopted by the City met constitutional requirements).

Any regulation or requirement, no matter how objective and specific, requires some application of facts to the specified criteria. The Constitution seeks to prevent only "unfettered" or "unbridled" discretion. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty in our language"). Where as here there are objective criteria by which to measure and guide the decisionmaker's actions, there is no "unfettered discretion." The Chicago Park District's permitting regulations are constitutional, in that they provide adequate objective criteria to evaluate permit applications in a content-neutral manner, and are constrained by articulated standards to guide the exercise of discretion. Thus, the regulations do not pose a real or substantial threat of censorship. See Ward, 491 U.S. at 794-95. Nor is there any evidence whatsoever that content has anything to do with the Chicago Park District's assessment of special event permit applications. See MacDonald, 243 F.3d at 1033. The Chicago Park District's exercise of discretion in this particular context, like all exercises of agency discretion, is subject to the legal requirement that the agency not act arbitrarily or capriciously. See Shuttlesworth, 394 U.S. at 154-55.

Unlike the ordinances that were struck down in Forsyth County, 505 U.S. at 133, and Lakewood, 486 U.S. at 769-70, in which the licensing authorities relied on subjective criteria in determining whether speech would be restricted, and in Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 798, 801 (1988), in which the licensors had the discretion to affect the content of the fundraisers' speech, regulations such as those at issue here lack any content-based consideration, and do not vest government officials with undue discretion to grant or deny permits. Thus, these regulations do not give unbridled discretion to licensing authorities, and are constitutional on their face, in that they do not implement subjective factors

that cannot be objectively verified or subjected to judicial review. See Forsyth, 505 U.S. at 133; Lakewood, 486 U.S. at 758. As in Ward, the challenged regulations are not vulnerable to petitioners' facial challenge.

POINT III

EVEN IF ANALYZED AS A PRIOR RESTRAINT, THE PERMITTING SCHEME IS VALID AND CONSTITUTIONAL, IN THAT IT PROVIDES ADEQUATE PROCEDURAL SAFEGUARDS TO PROTECT APPLICANTS' FIRST AMENDMENT RIGHTS.

Petitioners argue that the permitting scheme is an unconstitutional prior restraint, because it fails to provide for two of the three required procedural safeguards mandated by Freedman v. Maryland, 380 U.S. 51, 58-60 (1965). They contend that the regulations fail to provide for a prompt judicial determination, and fail to require the government to bear the burden of initiating judicial review, and to bear the burden of proof in the judicial review proceeding in Court (Pet.'s Br. at 30-42). They argue that prompt judicial review must include the requirement for a prompt decision (Pet.'s Br. at 33), and that the government must be required, at a minimum, to establish "a prima facie case supporting the denial of speech" (Pet.'s Br. at 35). The Seventh Circuit, however, correctly rejected this approach, and properly sustained, as constitutionally valid, the adequacy and pace of the available judicial review procedures. As the Court below concluded, the regulations in issue are not a form of censorship, in that they provide for no evaluation or assessment of the content or message sought to be conveyed, and the denial of permits does not relate to controversial or unpopular expression. See Thomas, 227 F.3d at 926, 928.

The Court below also correctly declined to require the Chicago Park District to seek judicial review of its own action each time it denies a permit, opining that Freedman v. Maryland restricts the judicially unauthorized regulation of the content of speech, and does not apply to time, place, and manner licensing provisions. Thomas, 227 F.3d at 926.

In Freedman v. Maryland, this Court determined that "to obviate the dangers of a censorship system," the following three procedural safeguards for such prior restraints should be implemented to ensure expeditious decisionmaking:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS, Inc. v. City of Dallas, 493 U.S. at 227, citing Freedman v. Maryland, 380 U.S. at 58-60. In FW/PBS, this Court applied some of the Freedman standards to a municipal ordinance which conditioned the operation of sexually oriented businesses on receipt of a license. See FW/PBS, Inc., 493 U.S. at 220-21; City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001).

This Court in FW/PBS, Inc. concluded that because the licensing scheme there did not present the grave "dangers of a censorship system," as occurred in Freedman, the full procedural protections required by that case were not necessary. FW/PBS, Inc., 493 U.S. at 228. Thus, the Court invoked the first two procedural safeguards as "essential," requiring (1) specified and reasonable time periods within

which the licensor must make the decision whether to issue the license, and (2) "the possibility of prompt judicial review in the event that the license is erroneously denied." Id. In concluding that the First Amendment does not require the government to bear the burden of going to court to effect the denial of a license application, or to bear the burden of proof in court, this Court noted that the licensing ordinance at issue in FW/PBS was significantly different from the censorship scheme in Freedman, where the censor engaged in direct censorship of particular expressive material. Id. at 229, 230. Unlike in Freedman, the Dallas ordinance in FW/PBS did not contemplate the city exercising discretion by passing judgment on the content of any protected speech, but rather, involved only a general review of each license application, which was a presumptively constitutional ministerial action. Id. at 229.

The permitting scheme at issue here likewise does not involve direct censorship of particular expressive material, nor the exercise of discretion by passing judgment on the content of any protected speech. Rather, as in FW/PBS, Inc., the Chicago Park District's review of special event permit applications is not presumptively unconstitutional, and the Chicago Park District is not required to initiate court proceedings to support a license denial, or to bear the burden of proof in that proceeding, as in the type of censorship scheme that was challenged in Freedman. Rather, a limitation on the time to issue the permit, and the availability of prompt judicial review, satisfy Constitutional requirements. See FW/PBS, Inc., 493 U.S. at 230; see also MacDonald, 243 F.3d at 1035-36 (recognizing legal and practical distinction between a censorship and a content-neutral licensing scheme, in holding that under rationale of FW/PBS, a content-neutral licensing or permit ordinance need not include a provision requiring the government to bear the burden of going to court to deny a permit); accord, Beal and MacDonald v. Stern, 184 F.3d at 128 (park permit ordinance, deemed to be a content-

neutral prior restraint, needed to comply with only first two Freedman procedural safeguards); MacDonald v. Safir, 206 F.3d at 195 (if the Police Commissioner does not in fact exercise discretion by passing judgment on the content of any protected speech, there may be no need for the Commissioner to bear the burden of going to court to justify the denial of a permit).

With respect to the third requirement of "prompt judicial review," the Circuit Courts have divided over whether this requirement encompasses a prompt judicial determination on the merits of the permit denial, or whether prompt access to court review is sufficient. See City News and Novelty, Inc., 531 U.S. 278, and cases cited therein. The City of New York respectfully urges this Court to adopt the reasoning of the First, Fifth, Seventh, and Eleventh Circuits, in holding that for content-neutral permit and licensing ordinances, the requirement of "prompt judicial review" is satisfied by access to prompt judicial review, and need not include a "deadlined" judicial determination on the merits of the permit denial. See MacDonald, 243 F.3d at 1035, and cases cited therein. Indeed, as the Seventh Circuit here recognized, the cases holding that judicial review of permit denials must have time limits all involved special licensing schemes for sexually oriented businesses, based upon this Court's censorship decisions, as in Freedman, or quasi-censorship rulings, as in FW/PBS, Inc. See Thomas, 227 F.3d at 927, and cases cited therein.

While Freedman requires prompt judicial resolution of censorship decisions, access to prompt judicial review is sufficient for permit and licensing decisions. See, e.g., Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1256 (11th Cir. 1999), cert. denied, 529 U.S. 1020 (2000). Licensing decisions are markedly different from censorship decisions, in that censors pass judgment on the content of expression, whereas licensing officials examine more mundane and

ministerial factors in deciding whether to issue a license or permit. Id. The need for a prompt judicial decision is thus far less compelling for licensing ordinances such as the special event permit regulations at issue here, than for censorship schemes. Because this case involves a permit regulation that is not a form of censorship, and does not require an evaluation of the content or the message of the regulated activity, access to prompt judicial review through State court common law certiorari proceedings passes constitutional muster. See MacDonald, 243 F.3d at 1035. Access to prompt judicial review is sufficient for licensing ordinances. See Boss Capital, Inc., 187 F.3d at 1256-57.

Accordingly, for all the above reasons, the City of New York respectfully urges this Court to affirm the judgment of the Seventh Circuit, recognizing that licensing ordinances and permit regulations such as those at issue in this case, that are routinely imposed to reasonably regulate the use of public parks and other public spaces for expressive and non-expressive uses, are reasonable and valid time, place and manner restrictions, and are not unconstitutional prior restraints, nor subject to the procedural safeguards applicable to censorship schemes that are aimed at affecting or preventing dissemination of the particular viewpoint, or prohibiting the content of the speech or message sought to be conveyed. The Chicago Park District's special event permitting regulations, like those in effect for the City of New York, are narrowly tailored to serve substantial and content-neutral governmental interests of ensuring the adequate protection and conservation of the public parks, maintaining park property, and furthering public safety and convenience in allowing the orderly and/or quiet use and enjoyment of the parks by all who wish to avail themselves of whatever opportunities, activities, or other attractions the parks may offer to individuals and groups. See Ward, 491 U.S. at 803; Clark 468 U.S. at 296-97, 298, 299. The regulations also leave open ample channels of communication. Accordingly,

they were properly upheld as valid under the First Amendment as reasonable time, place and manner regulations, and are not susceptible of invalidation, either in a facial challenge because they do not vest unbridled discretion in government officials, or as an unconstitutional prior restraint of the content of any expression. See Ward, 491 U.S. at 781. "Reasonable time, place or manner restrictions are valid even though they directly limit oral or written expression." Clark, 468 U.S. at 298 n.8. A regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests, but it need not be the least restrictive or least intrusive means of effecting those interests. Hill, 530 U.S. at 726; Ward, 491 U.S. at 798.

CONCLUSION

FOR ALL THE ABOVE REASONS, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

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No. 00-1249

IN THE

Supreme Court of the United States

CAREN CRONK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

v.

CHICAGO PARK DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING RESPONDENT

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Pursuant to Rule 37.3(b) of the Rules of this Court, *amici* respectfully move this Court for leave to file the attached brief *amici curiae* in support of respondent. Respondent has consented to the filing of this brief. This motion is made necessary by the refusal of petitioners to consent to the filing.

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the

issues presented in this case, which concern the constitutional rules governing access to parks and other public fora. This Court has recognized that regulation of the use of parks and other public spaces is essential to ensure the continued availability of these areas for both recreational uses and political demonstrations. *See, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Cox v. New Hampshire*, 312 U.S. 569 (1941). To protect parks from overuse and damage, and to ensure the convenience and safety of the citizens who frequent them for a wide variety of purposes, virtually all municipalities and other local governments have enacted permit systems regulating the use of public parks for large demonstrations.

If petitioners prevail on their claims that such permit systems must be treated as prior restraints of speech, that they must provide rigid timetables for judicial resolution of claims challenging permit denials, and that the government must initiate court proceedings in defense of all permit denials, the effectiveness of local regulation of public parks will be seriously impaired. Because *amici* have a deep interest in the type of ordinance at issue here, they seek leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

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August 22, 2001

QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether content-neutral permit systems for demonstrations in public parks should be treated as time, place, and manner regulations rather than as prior restraints.

2. Whether content-neutral permit systems for demonstrations in public parks are permissible if they allow prompt legal challenges to permit denials but do not require the government to initiate court proceedings and compel it to bear the burden of proof when it denies a permit application.

3. Whether content-neutral permit systems for demonstrations in public parks are constitutionally permissible if they allow prompt access to judicial review of permit denials without setting a rigid time limit for final judicial resolution of such challenges.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief. [1]

SUMMARY OF ARGUMENT

A. Petitioners' argument—that they are entitled to all of the protections set out in *Freedman v. Maryland*, 380 U.S. 51 (1965)—is premised on their fundamental contention that systems regulating the issuance of permits to demonstrate or rally in public parks must be treated as prior restraints. But in the circumstances of this case, petitioners' contention is wholly without merit. The Court has treated state regulation of speech as a prior restraint only when governmental officials restricted expression on the basis of its content, or had unbridled discretion to restrain speech that they disliked—settings where the regulation had "the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 649 (1981).

In contrast, regulations that serve purposes *unrelated* to the content of expression are deemed content-neutral, even if they have an incidental effect on some speakers and not on others. That sort of restriction is properly analyzed as a time, place, and manner regulation rather than as a prior restraint on speech. And here, it is manifest that the Chicago Park District ordinance, which regulates *all* park uses by any group of more than 50 persons, *is* content-neutral and *does not* grant Park District officials excessive discretion. It therefore cannot be deemed a prior restraint.

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[1] Pursuant to Rule 37.6 of the Rules of the Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

B. Petitioners also are wrong in contending that Park District officials must carry the burden of initiating judicial proceedings, and must bear the burden of proof in such proceedings, whenever they seek to deny a permit application. *Freedman* imposed such requirements on governmental decisionmakers when they sought to *censor* speech on the basis of its content. But as the Court subsequently made clear in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), these requirements have no application to licensing officials who do "not exercise discretion by passing judgment on the content of any protected speech." *Id.* at 229 (plurality opinion); *see also id.* at 244 (opinion of White, J.). That distinction makes perfect sense: because content-neutral regulations are not presumptively unconstitutional (in contrast to censorship regimes like the one at issue in *Freedman*, which are), there is no need for officials who are applying such regulations to seek prior judicial approval for their decisions. As a consequence, this aspect of *Freedman* is inapplicable to the content-neutral Chicago ordinance.

C. For similar reasons, petitioners are incorrect in their contention that the Chicago ordinance is unconstitutional because it does not impose a strict time limit on the completion of judicial review when permit applications are denied. *Freedman* imposed such a requirement of judicial expedition where content-based censorship was at issue because, in such a system, the censor bears the burden of seeking court approval for the suppression of speech; any restraint on speech imposed in advance of that approval must be temporary. When a content-neutral system like Chicago's is at issue, however, the government does *not* bear the burden of seeking court approval for permit denials. Because the requirement of advance judicial authorization was the essential predicate for *Freedman*'s further insistence on the prompt completion of judicial review, both of these elements of *Freedman* are inapposite here.

ARGUMENT

At the outset, a review of the legal landscape may help put the issue here in perspective. Virtually all municipalities of any size have permit systems, like the one used by the Chicago Park District, that govern the use of parks and similar public spaces for demonstrations and rallies. Although these permit ordinances provide for judicial review of decisions denying permits, we are not aware of any ordinance that requires the municipal government to initiate judicial proceedings when turning down a permit application. They also generally do not, and could not, require judicial resolution of challenges to license denials by a date certain; "[q]uite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000) (footnote omitted).

As a result, the rule contended for by petitioners—which would obligate municipal officials to seek advance judicial approval whenever they deny a protester's application to use the public parks, and which would require that courts issue decisions in such suits within a set time period—would render unconstitutional a very substantial body of municipal legislation, an outcome that would cause substantial disruption across the country. At the same time, local governments would lose the flexibility that the Court has recognized as essential in managing public resources. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986); *Cox v. New Hampshire*, 312 U.S. 569, 576-577 (1941). Fortunately, however, that outcome is not required here. Petitioners' argument is not supported by precedent; cannot be justified by the constitutional principles that underlie the Court's decisions in this area; and is inconsistent with the First Amendment rules governing the regulation of public fora generally. The decision below upholding the Chicago ordinance accordingly should be affirmed.

I. CONTENT-NEUTRAL SYSTEMS GOVERNING ACCESS TO PUBLIC SPACES THAT DO NOT GIVE GOVERNMENT OFFICIALS UNLIMITED DISCRETION TO DENY PERMIT APPLICATIONS SHOULD BE REVIEWED AS TIME, PLACE, AND MANNER REGULATIONS RATHER THAN PRIOR RESTRAINTS

The foundation for petitioners' argument is their claim that a system requiring issuance of a permit before an organization is allowed to demonstrate in the public parks amounts to a "prior restraint." Pet. Br. 15-25. But this contention is insupportable. The Court has treated state regulation of speech as a prior restraint in cases where officials controlled expression on the basis of its *content* or had virtually *unconstrained discretion* to deny speakers a license or permit—situations where the regulation of speech had "the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 649 (1981).

In contrast, the Court subjects limits on speech to the lower level of scrutiny suitable for time, place, and manner restrictions when the State has not

> adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. * * * Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (other citations omitted).

It is this latter analysis, suitable for content-neutral regulations, that generally should govern permit requirements for use of public parks. Such regulations plainly serve purposes that are "unrelated to the content of expression" and, because they typically require application of neutral criteria unrelated to the content of expression, are "*justified* without reference to the content of the regulated speech." *Id.* As a consequence, a content-neutral restriction on access to public parks need not be subjected to strict scrutiny because "concerns about 'prior restraints' relate to restrictions imposed by *official censorship*" aimed at the message of the regulated speech. *Hill v. Colorado*, 530 U.S. 703, 734 (2000) (emphasis added). *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763-64 n.2 (1994); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 374 n.6 (1997). With these principles in mind, the Court should affirm the Seventh Circuit's holding that the Chicago permit system may not be analyzed as a prior restraint.

A. Chicago's permit system is content-neutral

Under this Court's precedents, the principal inquiry in determining content neutrality in speech cases "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791; *see also Renton*, 475 U.S. at 47-48 (government regulation of expressive activity is "content neutral [so long as it is] *justified* without reference to the content of the regulated speech"). Under this test, the Park District ordinance must be deemed content-neutral—and petitioners do not seriously contend otherwise. There is absolutely no reason to believe either that the Park District's permit ordinance was enacted for the purpose of censoring disfavored views or that it has been implemented in a discriminatory manner. On the contrary, the ordinance's purpose is to regulate any use—athletic, social, cultural, or political—by any group of more than 50 persons. *See* J.A.

63-64 (provisions of Park District ordinance listing uses for which permit is required).

As the court of appeals found, "[t]he regulation challenged here does not authorize any judgment about the content of any speeches or other expressive activity." Pet. App. 3a. Quite clearly, its purpose is simply to regulate all access to public parks by large groups, thereby protecting the "substantial Government interest in conserving park property," *Clark*, 468 U.S. at 299, and ensuring that property's accessibility "to other members of the public." *Id.* at 298.

Indeed, far from censoring petitioners' efforts to promote the cause of marijuana legalization, the Park District allowed their demonstration to go forward despite their failure to meet the standards for a permit, and actually "assisted MacDonald [the now-deceased original plaintiff] by opening bathrooms, providing garbage cans, and allowing MacDonald to use portable speakers to amplify sound." Pet. App. 78a (opinion of district court). To hold that a risk of censorship exists in a case where the government not only did not try to suppress an unpopular demonstration but actually assisted it would be a surprising application of First Amendment principles.

B. Chicago's permit system is not a prior restraint because it does not give unfettered discretion to public officials

Because the Park District's regime is content-neutral on its face, it could present a danger of censorship only if it granted "unbridled discretion" to public officials. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). Petitioners' claim that the ordinance does vest officials with such an unconstitutionally excessive degree of discretion rests solely on a provision of the Chicago Park District ordinance that allows, but does not require, the Park District to deny permit applications that fail to meet objective content-neutral criteria. J.A. 71-73 (provision of ordinance setting forth

grounds for permit denials). Despite the absence of proof of any such discrimination, petitioners assert that this provision enables the Park District to discriminate against disfavored political speech.

This contention fails for three reasons. First, and most fundamentally, the degree of discretion allowed to the Park District is far less than the "unbridled discretion" necessary to trigger classification of the ordinance as a prior restraint. Second, there is no evidence that even this limited discretion has been used for purposes of discrimination, and this Court's First Amendment precedents require judicial consideration of agency practices as well as statutory text. Finally, the canon against statutory constructions that raise constitutional problems militates against any interpretation of the Park District waiver provision that labels it a vehicle for unbounded official discretion.

1. *Content-neutral permit systems are constitutionally problematic only if they give unbridled discretion to government officials*

As we have noted, the only situations in which the Court has treated a content-neutral regulation of speech as a prior restraint are those in which the regulatory regime "plac[es] unbridled discretion in the hands of a government official or agency." *Lakewood*, 486 U.S. at 757; *see also, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (invalidating a permit system because it allowed "arbitrary application"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (a prior restraint exists in cases "where officials have unbridled discretion over a forum's use"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (invalidating a permit system because it "empower[ed] its licensing officials to roam essentially at will"); *Cox v. Louisiana*, 379 U.S. 536, 556-57 (1965) (invalidating permit statute that "provides no standards for the determination of local officials as to which assemblies to permit or which to

prohibit" and thereby gave them "completely uncontrolled discretion"); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) (invalidating city solicitation permit "criteria" because they "are without semblance of definitive standards * * * governing the action of the Mayor and Council in granting or withholding a permit"); *Saia v. New York*, 334 U.S. 558, 560 (1948) (analyzing as prior restraint a city ordinance that prescribed "no standards * * * for the exercise of * * * discretion"); *Lovell v. City of Griffin*, 303 U.S. 444, 450-51 (1938) (striking down as a prior restraint ordinance that required written official permission for distribution of pamphlets without specifying the grounds upon which permission could be granted or denied); *cf. MacDonald v. City of Chicago*, 243 F.3d 1021, 1030 (7th Cir. 2001) (noting that this Court has declared facially content-neutral licensing systems to be prior restraints only in cases where they "placed unfettered discretion in the hands of * * * officials"), *petition for cert. filed*, No. 00-1839 (June 11, 2001).[2]

The Court has explained that such permit systems are problematic because of the danger that unconstrained

[2] Two recent appellate decisions relied upon by petitioners do not depart from the rule that content-neutral permit systems may be considered prior restraints only if they provide for unbridled official discretion. *See* Pet. Br. 24. In *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761, 771 (11th Cir. 2000), *petition for cert. filed*, No. 00-1503 (Mar. 29, 2001), the Eleventh Circuit held that a city sound ordinance was a prior restraint because it allowed sound devices to be suppressed at the "uncontrolled discretion" of the police. Similarly, in *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999), the Second Circuit held that a city assembly and rally permit system was a prior restraint but noted that "content-neutral" permit systems that "do 'not delegate overly broad licensing discretion' to government officials" should be analyzed as "time, place, and manner restrictions." *Id.* at 124 (quoting *Forsyth County*, 505 U.S. at 130). There accordingly is no support for petitioners' contention "that any scheme which allows a governmental entity to deny the use of a public forum in advance of actual expression is a prior restraint." Pet. Br. 20-21.

discretion will be used to "discriminat[e] against disfavored speech" and encourage "self-censorship" by permit applicants. *Lakewood*, 486 U.S. at 757-58. *See also Hill*, 530 U.S. at 734 (holding that prior restraints are distinguished by the threat of "censorship"); *Southeastern Promotions*, 420 U.S. at 553 (noting that the doctrine of prior restraint reflects "[o]ur distaste for censorship"). In *Lakewood*, for example—one of the decisions principally relied upon by petitioners—"nothing in the law * * * require[d] the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application." 486 U.S. at 769. Discrimination against disfavored speakers is almost inevitable in such a system.

These dangers, however, are simply not present in the instant case where there are precise standards that severely constrain official discretion. The Park District's permit system establishes clear criteria to govern the evaluation of applications. These rules ensure that proposed demonstrations do not interfere with the parks' primary recreational uses, that they do not conflict with other approved rallies, and that they do not pose an excessive danger to public safety. *See generally* J.A. 71-73. Indeed, in the Chicago park system, official discretion enters the picture only in cases where permit seekers have *already* failed to meet objectively determined, content-neutral standards for a permit. In all other cases, the Park District is required to grant the permit application irrespective of the speakers' ideology. It is unlikely that a true system of censorship would limit its impact to selective discrimination against a subclass of permit-seekers defined by their failure to meet objective and content-neutral permit standards.

In fact, in analogous circumstances the Court has held that regulatory schemes creating limited administrative discretion over a subset of issues relating to permit applications are "of an entirely different, and lesser, order of magnitude" from those in which "officials enjoy unguided discretion to deny the right to speak altogether." *Ward*, 491 U.S. at 794. Thus,

in *Ward*, the Court held that a city ordinance giving officials discretion to determine the level of sound amplification available to permit holders did not constitute unlimited discretion amounting to a prior restraint despite the fact that "the city's sound technician theoretically possesses the power to shut off the volume for any particular performer," *id.* at 795 n.5, and thereby "provide inadequate sound for performers based on the content of their speech." *Id.* at 794.

This distinction between limited and wholly unfettered discretion is essential if local governments are to perform their vital function of regulating the use of public spaces. Some degree of official discretion is inevitable in any permit system. Subjecting all instances of official discretion to the stringent scrutiny imposed on prior restraints that pose a threat of censorship would undermine the legitimate operations of local governments, make the operation of parks and other public fora a practical impossibility, and lead to an enormous diversion of scarce judicial resources away from real dangers to constitutional rights.

2. *A history of unbiased implementation shows that the Chicago ordinance does not provide officials with unbridled discretion that poses a threat of censorship.*

In addition, the Court has held that "[a]dministrative interpretation and implementation of a regulation are * * * highly relevant" to any judicial determination of the scope of discretion that a permit system provides officials. *Ward*, 491 U.S. at 795. The Court thus recognizes that meaningful limits on official discretion may be imposed not only by "textual incorporation" in a statute but also by "binding judicial or administrative construction, or *well-established practice.*" *Lakewood*, 486 U.S. at 770 (emphasis added) (other citations omitted).

In this case there is a "well-established practice" of basing decisions to withhold permits solely on content-neutral criteria relating to the legitimate management of public parks. There is no indication in the record that the Park District has ever denied a permit based on the content of the applicant's speech, or even that it has *inquired* into that content. Indeed, Mr. MacDonald's repeated success in obtaining permits would seem to prove the point. Thus, even if the text of the Park District ordinance—read literally and in isolation from other evidence—could be thought to grant overbroad discretion to Park District officials, longstanding patterns of "administrative * * * implementation," *Ward*, 491 U.S. at 795, show that this discretion cannot remotely be thought to amount to a system of censorship.

3. *The canon against statutory constructions that raise constitutional problems precludes reading the Chicago ordinance to confer unconstitutionally excessive official discretion*

By the same token, judicial interpretations of local ordinances challenged on First Amendment grounds must not "r[u]n afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). "[T]he Court has held that a state statute should not be deemed facially invalid [under the First Amendment] unless it is not readily subject to a narrowing construction by the state courts." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (holding that "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute").

In the event that a broad reading of the Park District ordinance is thought constitutionally problematic, such a "narrowing construction" is readily available. The ordinance

states that the Park District "may deny an application for permit" if the application fails to meet various specified conditions relating to safety, user fees, proper application procedures, and consistency with other uses of the park. J.A. 71. The word "may" need not be interpreted to give the District completely unconstrained discretion to accept or deny applications that violate one or more of the objective criteria set out in section C.5.e of the Park District ordinance. *See* J.A. 71-73. Instead, the provision could reasonably be interpreted to allow waivers in cases where the District has reason to believe that permit applicants are likely to uphold the substance of the particular condition in question, even though they are in technical violation of it. In the case of the requirement affecting petitioners here—that applicants not have "violated the terms of prior permits issued" to them—it is reasonable to suggest that the condition may be waived in cases where the Park District has reason to believe that such violations will not recur. *See* J.A. 73 (§ C.5.e (13)).

At the very least, it is reasonable to interpret the waiver provision in a way that forbids the Park District to base its judgments on the content of applicants' speech. There accordingly is a reasonable alternative interpretation that enables the Court to "avoid [the] constitutional difficulties" inherent in any construction of the ordinance that leaves the door open to content-based discretion. *Frisby*, 487 U.S. at 483.[3]

[3] The only alternative to such an approach would be for the Park District to eliminate the waiver provision entirely by refusing permits to *all* applicants who violate the standard permit criteria. Such an unforgiving policy would reduce the total amount of speech in Chicago's parks, making the permit system "more restrictive" than it is currently. Pet. App. 6a. A decision effectively eliminating all discretionary waivers therefore would undermine the First Amendment goal of furthering the use of public spaces for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

4. *The political content of petitioners' speech is irrelevant to the prior restraint question*

Finally, the content of petitioners' speech is irrelevant to the prior restraint issue in this case. In fact, petitioners' contention (Pet. Br. 15) that they are entitled to especially favorable treatment because they seek to engage in political speech would itself raise serious constitutional problems by *requiring* the Park District to engage in content-based discrimination.

To satisfy petitioners' demands, the Park District would have to give proposed political demonstrations more favorable consideration than that allowed applicants who wish to speak on cultural, artistic, or other matters. Yet such a demand for content-based discrimination violates the fundamental First Amendment principle that "government regulation" must not "discriminate[] among speech-related activities in a public forum" on the basis of their "subject matter" unless the regulation at issue can survive the most exacting judicial scrutiny. *Carey v. Brown*, 447 U.S. 455, 461-62 & n.6 (1980); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (holding that in "quintessential public forums" such as "streets and parks * * * [f]or the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

Not surprisingly, the various decisions cited by petitioners are inapposite, *see* Pet. Br. 15-16; each addressed a situation where the government imposed content-based restrictions on speech or specifically *targeted* political speech for restriction. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking down state restrictions on distribution of campaign literature); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (invalidating libel statute as applied to criticism of public officials); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (same).

C. The Court should defer to the City's interest in content-neutral regulation of limited public spaces

In view of the wide range of uses made of Chicago's parks, compelling practical considerations, noted by the Park District in its brief, support the conclusion that courts should hesitate before applying prior restraint analysis to content-neutral permit processes regulating the use of limited public spaces. In such situations, local governments have an especially strong "interest in protecting the 'safety and convenience' of persons using a public forum." *Heffron*, 452 U.S. at 650 (internal citation omitted). And "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Id.* at 650-51.

For this reason, restrictions on the use of public parks may satisfy constitutional requirements even if they would not be upheld in other settings. Regulations governing the use of public spaces that are "designed to promote the public convenience in the interest of all * * * cannot be disregarded [even] by *the attempted exercise of some civil right which in other circumstances would be entitled to protection*." *Cox*, 312 U.S. at 574 (emphasis added). Indeed, in the case of public parks the Court has specifically recognized "the Government's substantial interest in maintaining" facilities "in an attractive and intact condition, readily available to the * * * people who wish to see and enjoy them." *Clark*, 468 U.S. at 296. Even petitioners' *amicus* Public Citizen concedes that government has a special interest in regulating access to parks because they are "limited public resources." Public Citizen Br. *Am. Cur.* 20.

As the court of appeals rightly pointed out, excessive judicial scrutiny of government regulation of parks may undermine the usefulness of these vital public fora for all

citizens, including organizers of political demonstrations; "to allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech." Pet. App. 3a. If local governments were not allowed to use any discretion but instead had to subject all permit applications to rigid criteria, they would have to impose either extremely strict requirements that would exclude a large number of legitimate applicants or very loose ones that would lead to overcrowding and cause damage to park facilities. In either case, parks would have less utility as settings for political speech than if authorities were allowed a reasonable degree of content-neutral discretion. To prevent this unhappy state of affairs, public officials who have the responsibility to regulate public spaces must be permitted to exercise reasonable, content-neutral discretion.

II. CONTENT-NEUTRAL PERMIT SYSTEMS REGULATING THE USE OF PUBLIC SPACES NEED NOT OFFER THE FULL RANGE OF PROCEDURAL SAFEGUARDS REQUIRED OF CONTENT-BASED CENSORSHIP SYSTEMS

It is common ground between the parties in this case that a classic prior restraint, in which government officials are given substantial discretion to suppress speech that they dislike, must be subjected to the most rigorous procedural requirements. That is the rule stated in *Freedman v. Maryland*, 380 U.S. 51 (1965), where state law empowered officials to prevent the exhibition of films that they did not find to be "moral and proper." *Id.* at 52 n.2 (citation omitted). Insofar as is relevant here, the *Freedman* Court held that, for such a restraint to be valid, (1) "the burden of proving that the film is unprotected expression must rest on the censor"; (2) "the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression," meaning that the censor either must issue a license "within a specified

brief period * * * or go to court to restrain showing the film"; and (3) "the procedure must also assure a prompt final judicial decision." *Id.* at 58-59. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 227 (plurality opinion). Petitioners assert that each of these requirements must apply to permit systems like those used by the Park District. Pet. Br. 30-40. This contention, however, is wrong in every particular.

A. An agency administering a content-neutral permit system is not required to initiate judicial proceedings in defense of permit denials and need not bear the burden of proof in court

To begin with, the Court's decision in *FW/PBS* unequivocally refutes petitioners' claims that the Chicago ordinance is unconstitutional because it does not require the Park District to initiate judicial proceedings in defense of all permit denials, and does not require the government to bear the burden of proof in such proceedings. The plurality opinion in *FW/PBS* specifically distinguished "licensing scheme[s]" from regulations of expressive content, reasoning that the former "do[] not present the grave 'dangers of a censorship system'" and therefore do not require "the full procedural protections set forth in *Freedman*." *FW/PBS*, 493 U.S. at 228 (plurality opinion) (internal citation omitted). As the plurality explained, a licensing system that "does not exercise discretion by passing judgment on the content of any protected speech" but merely "reviews the general qualifications of each license applicant" is "a ministerial action that is not presumptively invalid." *Id.* at 229.

The plurality therefore concluded that a licensing system for adult businesses that "does not exercise discretion by passing judgment on the content of any protected speech" need "not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *FW/PBS*, 493 U.S. at 229-30 (plurality opinion). Justice White and then-Justice

Rehnquist went even further, expressing the view that *Freedman* was *wholly* inapplicable to such content-neutral ordinances. *Id.* at 244-46 (opinion of White, J.). This conclusion by a majority of the Court that the first two elements of *Freedman* apply only to regulations that discriminate on the basis of content is dispositive of petitioners' claims here.

Not surprisingly, the view of the *FW/PBS* plurality is supported by more general First Amendment principles, which compel the conclusion a permit system governing use of public parks need not require initiation of judicial proceedings by governmental authorities whenever a permit is denied. The decisions in which the Court has applied such a "government-initiation" requirement involved regulations of speech that were "presumptively invalid." *FW/PBS*, 493 U.S. at 229 (plurality opinion). As we suggest above, these included, most prominently, cases presenting censorship schemes in which state officials passed prior judgment on the content of speech, as in *Freedman* itself. *See, e.g.*, *Freedman*, 380 U.S. at 52, 54-55; *Southeastern Promotions*, 420 U.S. at 552-53; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

Such restrictions present particular dangers because they permit the suppression of speech by officials who may disapprove of the ideas expressed or the means of expression; because even well-intentioned censors may be led into error by the fact that fully protected speech "is often separated" from expression that is legitimately subject to regulation (such as obscenity) "only by a dim and uncertain line," *Bantam Books*, 372 U.S. at 66; and "[b]ecause the censor's business is to censor," meaning that state officials with responsibility for censorship may be insensitive "to the constitutionally protected interest in free expression." *Freedman*, 380 U.S. at 57-58.

The Court likewise has suggested that the *Freedman* procedural safeguards may be necessary when issuance of a permit or license is "'contingent upon the uncontrolled will of an official.'" *Shuttlesworth*, 394 U.S. at 151 (citation omitted). By giving free rein to the exercise of discretion, such systems inevitably invite biased application against unpopular speakers. In such cases, as in the ones involving the express censorship of content, "the prior restraint [i]s embedded in the licensing system itself, operating without acceptable standards." *Southeastern Promotions*, 420 U.S. at 553. Thus, all of these cases "involved censorship" and resulted in the presumptively unconstitutional suppression of speech. *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000).

Ordinances like the one at issue here, however, are fundamentally different from the *Freedman* paradigm in a variety of material respects. *First*, as Justice O'Connor noted in *FW/PBS*, licensing schemes that do not involve an assessment of the content of regulated speech do not allow for the suppression of particular ideas. "Under [such an] ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *FW/PBS*, 493 U.S. at 229 (plurality opinion). *See Boss Capital*, 187 F.3d at 1256 ("The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the *content* of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license."). Officials of the Chicago Park District thus base their licensing decisions on objective factors such as a history of prior violations, not on the content of the applicant's expression.

Second, such permit systems give local officials very limited discretion. Administrators are not permitted "'to

roam essentially at will,'" *Shuttlesworth*, 394 U.S. at 153 (citation omitted), or to exercise a judgment that has a large subjective component. Instead, municipal decisionmakers are directed to judge compliance only with a defined set of neutral and objective factors.

Third, the practical impact of a permit regime for use of municipal parks differs significantly from that of the censorship system at issue in *Freedman*. The expense and delay inherent in challenging the suppression of a single movie or book in a given locality means that exhibitors or publishers, who have other markets open to them and other products to sell even in the censor's jurisdiction, may find it "too burdensome to seek review of the censor's determination." *Freedman*, 380 U.S. at 59. In contrast, a group that is determined to carry out a single demonstration at one location has "every incentive * * * to pursue a license denial through court." *FW/PBS*, 493 U.S. at 230 (plurality opinion). Indeed, petitioners have persisted in their challenge to the Chicago Park District's permit system despite the fact that they were *allowed* to hold the demonstration initially in question. *See* Pet. App. 77a-78a. And there is no reason to believe that activist groups seeking to hold repeated demonstrations at prime locations in major cities will be any less persistent in defending their interests than the adult businesses whose interests were at stake in *FW/PBS*. *Cf. Cannabis Action Network*, 231 F.3d at 763-64; *Beal*, 184 F.3d at 121-22.

Against this background, First Amendment principles do not require the significant intrusion into state administrative and judicial processes that would follow from conditioning the constitutionality of permit regimes for public parks on governmental initiation of judicial action when a permit is denied. Because these licensing regimes are "not presumptively invalid," there is no logical reason to insist that officials validate their decisions by seeking judicial approval or by bearing the burden of proof in such proceedings. This

conclusion does not, of course, leave permit applicants defenseless against oppressive government conduct; applicants always may seek temporary restraining orders or preliminary injunctions to prevent clear cases of abuse on the part of local officials. *See Nightclubs, Inc.*, 202 F.3d at 897 (Merritt, J., dissenting) (discussing licensing of adult businesses); *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070, 1071 (5th Cir. 1994) (same). This case therefore calls "for 'treating unlike things differently according to their differences,'" *Boss Capital*, 187 F.3d at 1256 (citation omitted)—and thus for a departure from *Freedman*'s requirement of governmentally initiated judicial proceedings.

B. Content-neutral permit systems need not place a rigid time limit on judicial review

In addition, if we are correct in our view that municipal officials need not initiate judicial proceedings whenever they deny permit applications, it necessarily follows that the First Amendment does not require a fixed date for the resolution of judicial challenges to license suspensions. Because permit denials are not "presumptively invalid," *Freedman*'s requirement that the censor initiate judicial proceedings is inapplicable here. The requirement that the censor go to court, however, was an essential premise for *Freedman*'s further insistence on the prompt completion of judicial review—meaning that the inapplicability of the former requirement in this context necessarily also affects the mandate for expedited judicial review.

The Court explained in *Freedman*:

> [W]hile the State may require advance submission of all films, * * * the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. * * * [A] procedure requiring a judicial determination suffices to impose a valid final restraint. To this end, the exhibitor must be assured

> * * * that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the distributor. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 58-59 (citations omitted). The Court's holding in *Freedman* thus was that, where censorship schemes are at issue, the decision to prohibit expression may not have final effect absent a judicial decision; that any restraint imposed in advance of such a judicial decision may be only temporary; and that, because speech might be inhibited after the expiration of a temporary administrative restraint during the pendency of the required judicial review, a prompt final judicial decision must be assured "to minimize the deterrent effect of an interim" license denial.

This analysis, however, has no application where the issuance of permits to use park facilities is concerned because in that setting a restraint on speech *may* become final in the absence of a judicial decision; denial of a license will be permanent unless the *applicant* decides to challenge the restraint in court. As a consequence, the administrative decision to deny a park permit need *not* be only temporary. And this means that *Freedman*'s rationale for requiring a prompt judicial resolution—the concern that speech might be inhibited during the period between the expiration of a temporary administrative restraint and the rendering of the judicial determination that is necessary for the censor's decision to become final—has no bearing on schemes for

issuing permits for the use of park facilities, where a judicial decision is not a prerequisite for a denial to become effective. It therefore is implicit in the analysis of *FW/PBS* that ordinances of the sort at issue here need not impose rigid deadlines on the judicial review process. *See* 428 U.S. at 228-30 (plurality opinion); *id.* at 244 (opinion of White, J.).[4]

Here, the challenged ordinance requires that the Park District act on a permit application within twenty-eight days and that the Superintendent of the District decide an appeal from a permit denial within seven days. *See* Pet. App. 10a. Illinois law allows petitioners immediately to challenge a permit denial by the superintendent in state court. *See id.* at 8a-9a (collecting cases). There is no reason to believe that this system poses a "grave danger * * * of * * * censorship" severe enough for the Constitution to require rigid time limits on judicial review. *FW/PBS*, 493 U.S. at 228 (plurality opinion).

[4] At least four federal courts of appeals have adopted this approach in the context of various licensing and permit schemes. *See MacDonald*, 243 F.3d at 1035; *Boss Capital*, 187 F.3d at 1256; *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc), *cert. denied*, 511 U.S. 1085 (1994); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). *See also City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870, 882 (Wis. Ct. App. 1999), *dismissed as moot*, 121 S.Ct. 743 (2001). Three circuits have taken the opposite view. *See Nightclubs, Inc.*, 202 F.3d at 892; *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir.) (en banc), *cert. denied*, 516 U.S. 1010 (1995).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAREN CRONK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD,
Petitioners,

v.

CHICAGO PARK DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The International Municipal Lawyers Association ("IMLA"), as amicus curiae, files this brief in support of the Respondent, the Chicago Park District.[1]

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues.

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, the amicus curiae represents that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's specific interest in this case lies in the impact that this Court's ruling will have on local governments throughout the United States. Local governments throughout the United States, whether they are special districts, like the Chicago Park District, cities, or counties, process multiple requests for the use of public property every week, sometimes daily. These permitting processes require significant resources in terms of manpower and finances. This Court's decision will, therefore, greatly affect the manner in which local governments on a national level will be able to effectively manage these spaces. IMLA, as an organization promoting legal issues on behalf of local governments, therefore, files this brief on behalf of its members nationwide.

SUMMARY OF THE ARGUMENT

Content-neutral time, place and manner regulations not equivalent to prior restraints and should not be analyzed under either *Freedman v. Maryland*, 380 U.S. 51 (1965) or *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). Content-neutral time, place, and manner regulations of public fora have long been recognized by this Court as valid exercises of local government authority. When the discretion of local government authorities is properly curtailed by the terms of content-neutral time, place and manner regulations, the burden of challenging the regulations properly falls on those citizens seeking to invalidate the regulations. To hold

otherwise would be to require local governments to relinquish all control over public fora, to the detriment of society as a whole.

ARGUMENT

I. RECONCILING TWO CONFLICTING RIGHTS OF THE AMERICAN CITIZENRY THROUGH PROPER PUBLIC FORA REGULATION ANALYSIS

This Court again faces the question of reconciling the interests of the citizenry in the exercise and expression of First Amendment rights in public places with the interests of the citizenry in local governments' authority to protect the public peace and the use of streets and parks. The Petitioners have framed the question in terms of unpopular political speakers at odds with bureaucratic governments, which will impose so many obstacles that many of the political speakers will be silenced. Pet. Brief at 11. However, the permitting scheme in this case, like the permitting ordinances of a host of local governments throughout the United States, does not present a question as posed by the Petitioners. Framing the question in terms of an oppressed citizenry attempting to express political views against an opposing government bureaucracy oversimplifies the issues, prevents a true examination of the issues in this case, and prevents an adequate examination of the effect this case will have on local governments' ability to ensure just, fair, and orderly use of public fora in the United States.

The simple question before the Court asks how local government regulations of public spaces should be evaluated.

Does First Amendment analysis in the context of quintessential public fora involve two distinct theories (content-neutral, time, place, and manner analysis and prior restraint analysis) or only one theory (prior restraint analysis)? To histrionically frame the question in the Petitioners' terms - those of an abused citizenry against a tyrannical government - dictates the answer and prevents an adequate analysis. Properly framing the question, reviewing this Court's precedent, and truly evaluating the interests at stake, mandates the conclusion that First Amendment analysis of regulations governing public fora consists of two distinct legal theories which are mutually exclusive and depend on the terms and application of the regulation. Proper framing allows the various and potentially conflicting rights of all the American citizenry to be adequately, effectively, and correctly reconciled and protected.

A. Content-Neutral Time, Place and Manner Regulation Differ *Toto Coelo* From Prior Restraints

Content-neutral time, place and manner regulations differ in critical respects from prior restraints. Prior restraints by definition present the danger of allowing the government to censor speech. Content-neutral time, place and manner regulations, on the other hand, do not present the danger of censorship because they are not directed at speech or viewpoint, rather they are directed at the public places where speech occurs.

1. *Cox v. New Hampshire* - This Court's Controlling Content-Neutral Time, Place and Manner Precedent

This Court has long recognized the authority of local governments to regulate public fora for the safety and convenience of their citizenry. In addition, this Court has not found this authority to be inconsistent with First Amendment protections, but rather, has held this authority to be necessary to the orderly conduct of a civilized society in which the rights of *all* citizens are protected. In *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) - the premier content-neutral time, place, and manner permitting case, directly on point and wholly ignored by the Petitioners - this Court stated

> [t]he authority of a municipality to impose restrictions in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

The *Cox* case involved the conviction of Jehovah's Witnesses for marching and carrying signs on a public sidewalk without a permit. *Cox*, 312 U.S. at 572. A New Hampshire state law required that individuals engaging in such activity obtain a license from local authorities to conduct such a demonstration. *Cox*, 312 U.S. at 573. This Court found the statute at issue to be a *constitutional and traditional* exercise of authority and control by local

government over public space which had been "immemorially" associated with communication. *Cox*, 312 U.S. at 574-75.

The *Cox* regulation allowed the government to prevent confusion which could be caused by possible overlapping parades, to secure reasonable use of the streets by other travelers, and to minimize the risk of disorder through the conditioning or change of the application in terms of time, place, and manner. *Cox*, 312 U.S. at 576. According to this Court, local governments could not be denied the authority to dictate the time, place, and manner of proper uses of the streets, provided they exercised this control without discrimination. *Cox*, 312 U.S. at 576.

This Court specifically distinguished several cases wherein local government ordinances had been held unconstitutional. This Court noted that those cases involved local government officials' use of *unfettered* discretion to determine:

- what activities could be engaged in (*Schneider v. Irvington*, 308 U.S. 147 (1939) and *Cantwell v. Connecticut*, 310 U.S. 296 (1939)),
- what literature could be distributed (*Lovell v. Griffin*, 303 U.S. 444 (1937)), or
- what constituted peaceful picketing (*Thornton v. Alabama*, 310 U.S. 88 (1939) and *Carlson v. California*, 310 U.S. 106 (1939)).

Cox at 577-78.

Unlike those cases, the *Cox* statute did not involve a restraint on the *freedom of speech* nor the use of unfettered discretion, but rather, the *exercise of local control over the use of streets* for parades and processions. *Cox* at 578. This Court's decision was made with no reference to any obligation of the local government to affirmatively go to court to obtain a judicial decision, much less any reference that the local government must assure a judicial decision be "promptly" forthcoming.

In fact, this Court did not invoke prior or previous restraint analysis at all, even though it had previously used these concepts when deciding other cases. See *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940); *Lovell v. Griffin*, 303 U.S. 444 (1937). Rather, this Court wrote purely in terms of content-neutral time, place and manner regulation. Because this Court understood "prior restraint" or "previous restraint" theory at the time it decided *Cox*, it cannot be assumed that the landscape somehow changed with *Freedman v. Maryland*, 380 U.S. 51 (1965).

2. This Court's Content-Neutral Time, Place and Manner Analysis Before and After *Cox*

The Court's decision in *Cox* is not the only decision providing guidance as to how this case should be decided. In fact, a year earlier, in *Cantwell v. State of Connecticut*, 310 U.S. 296, 305 (1940), this Court wrote that a general regulation in the public interest, *did not* "constitute a prohibited previous restraint" on First Amendment activity. That statement alone should end the inquiry in this case. However, there are additional precedents which support the

ability of local government to regulate public fora without having to comply with the requirements set forth in *Freedman*.

In *Niemotko v. Maryland*, 340 U.S. 268, 279 (1951), Justice Frankfurter noted that the "pioneer case" discussing speech in public fora was *Davis v. Massachusetts*, 167 U.S. 43 (1897). The *Davis* case upheld the right of local governments to require a permit be obtained by persons making a "public address" on public grounds. The petitioner in *Davis* argued that the ordinance was arbitrary and unreasonable because it vested discretion in the Mayor, but this Court disagreed and held that local government had the right to dictate the manner in which the public property may be used. *Davis*, 167 U.S. at 47. Justice Frankfurter, commenting on the *Davis* decision, noted that this Court "respected the finding that the ordinance was not directed against free speech, but was intended as a proper regulation of the use of public grounds." *Niemotko*, 340 U.S. at 279 (internal citation omitted). This Court's recognition of local governments' ability to regulate the time, place, and manner of speech, without the requirements of prompt judicial review or initiating court proceedings, extends back *more than one hundred years*.

Similarly, discussing *Hague v. C.I.O.* , 307 U.S. 147 (1939), - a case relied on by Petitioner - Justice Frankfurter explained that the holding of *Hague* was not that a city could not subject its parks and streets to reasonable regulation, but rather, that licensing officials could not be given *arbitrary power to suppress free expression*. *Niemotko*, 340 U.S. at 279. The *Hague* fact patterned is wholly different from this case and wholly different from the permitting scheme used

by the vast multitude of local governments today. Therefore, *Hague* is inapplicable to this case. Justice Frankfurter noted that *Cox* "made it clear that the United States Constitution does not deny localities the power to devise a licensing system if the exercise of discretion . . . is properly confined." *Niemotko*, 340 U.S. at 280. Justice Frankfurter did not suggest that any of the requirements urged on this Court by the Petitioner were necessary in the context of content-neutral time, place, and manner restrictions. As a matter of fact, he succinctly stated the very principle which should decide this case:

> **A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like.**

Niemotko, 340 U.S. at 283 (emphasis added).

Because a content-neutral time, place and manner restriction differs *toto coelo* from a prior restraint, the two types of regulations should not be analyzed under the same First Amendment framework. The regulations at issue in this case, like the regulations of a multitude of local governments throughout the United States are limited by their terms to considerations of public safety, convenience, and the like. Therefore, as Justice Frankfurter stated, these regulations should not be treated as "censorship."

3. The Continued Vitality of *Cox*, *Niemotko* and Justice Frankfurter's Reasoning

A reference to more recent jurisprudence from this Court shows that this Court continues to recognize the distinction between content-neutral time, place, and manner restrictions and prior restraints. In *Hill v. Colorado*, 120 S. Ct. 2480 (2000), the Court upheld a statute that constituted an outright prohibition on certain modes of speech near health care facilities. The Supreme Court reviewed that statute as a content-neutral time, place, and manner regulation, specifically rejecting a prior restraint analysis.

This Court, echoing analysis used in *Cox* and *Niemotko*, held that the Colorado statute was constitutional because it did not regulate speech, but rather, regulated the *places* where some speech may occur. This Court emphasized that the Colorado statute did not place restrictions on the viewpoint or subject matter discussed by the speaker, but rather, "establishe[d] a minor place restriction" on a category of communications. *Hill*, 530 S.Ct. at 2491.

Similarly, the Chicago Park District's permitting scheme, like permitting schemes in use by local governments throughout the United States, addresses the time, place, and manner by which public demonstrations may be held. The permitting scheme does not make judgments as to the content of speech. Rather the scheme regulates the place where speech may occur.

4. The United States Constitution Does Not Require Local Governments To Bear the Burden of Seeking or Guaranteeing Judicial Review of Content-Neutral Time, Place and Manner Regulations

This Court's decision in *Poulus v. New Hampshire*, 345 U.S. 395 (1953), - a case again wholly ignored by the Petitioner - clearly answers the Petitioners' concern as to who should bear the burden of initiating and obtaining "prompt" judicial review in cases involving content-neutral time, place, and manner regulations. There, this Court stated that the principles of the First Amendment are not a promise to everyone with opinions or beliefs to express, that they may gather at any place and at any time for discussion. "It is a non sequitur to say that First Amendment rights may not be regulated . . . ." *Poulus*, 345 U.S. at 405. Justice Reed, writing for the Court, noted the Court's approval of reasonable, nondiscriminatory government regulations which preserve the peace, order and tranquility without deprivation of First Amendment guarantees. *Poulus*, 345 U.S. at 405.

Going further, Justice Reed acknowledged the burden created by placing the responsibility of the defense of First Amendment rights on the citizenry, but noted that this was necessary in an ordered society.

> [J]udicial correction of arbitrary refusal by administrators to perform official duties under valid laws is exulcerating and costly. But to allow applicants to proceed without the required permits to . . . hold public meetings without prior safety arraignments or to take unauthorized action is apt to

> cause breaches of the peace or create public dangers. The valid requirements of license are for the good of the applicants and the public."

Poulus, 345 U.S. at 409. Continuing, Justice Reed stated for this Court:

> Delay is unfortunate, but *the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have real and abiding meaning*."

Poulus, 345 U.S. at 409. (Emphasis added).

As can be seen from the above, not only is the permitting scheme in this case a constitutional content-neutral time, place and manner regulation, but requiring citizens rather than local governments, to initiate court proceedings is also constitutional and has been recognized as such for almost fifty years.

B. This Court's Prior Restraint Analysis is Wholly Inapplicable to this Case and to Content-Neutral Time, Place, and Manner Regulations

The Petitioners' reliance on this Court's prior restraint analysis is wholly misplaced because of the different factual nature of prior restraint cases from matters involving content-neutral time, place and manner regulations. In *Freedman*, the Supreme Court examined a Maryland motion picture *censorship* statute that required theaters submit films to a State Board of Censors and obtain a license before showing

the films, *based on the Board's decision regarding whether the film was obscene*. *Freedman*, 380 U.S. at 52. Therefore, it was up to the government to make a decision regarding the value of the speech involved. Unlike *Freedman*, this case and its permitting scheme, like the great multitude of permitting schemes throughout the United States, does not present the Court with a government regulation which allows the government to pass judgment on the value, viewpoint or content of the speech.

Similarly, *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990) is distinguishable from this case. At the outset, Justice O'Connor noted that the petitioners had raised a facial challenge to Dallas' licensing scheme. *FW/PBS*, 493 U.S. at 223. Justice O'Connor further noted that facial challenges to licensing schemes are generally disfavored, except in the "First Amendment context where the licensing scheme vests unbridled discretion in the decision maker. . . ." *FW/PBS* 493 U.S. at 223. The unbridled discretion in *FW/PBS* arose in the failure of the Dallas ordinance to place time limits on the city in which to inspect sexually oriented businesses for compliance with health, fire and building codes. *FW/PBS* 493 U.S. at 227.

This case does not raise similar "unbridled discretion" concerns. The regulations in this case, like the regulations of local governments throughout the United States, are limited in terms of timing and provide standards to be used in denying permits. Therefore, these regulations should not be treated as prior restraints.

II. FAR-REACHING EFFECTS OF DETERMINING WHETHER CONTENT-NEUTRAL TIME, PLACE, AND MANNER REGULATIONS MUST COMPLY WITH *FREEDMAN*

This case has far-reaching effects beyond the Chicago Park District. Currently this Court has before it two petitions for certiorari involving virtually identical questions of law. *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3657 (U.S. March 29, 2001) ((No. 00-1503) and *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3791 (U.S. March 29, 2001) (No. 00-1839). In addition to those cases, various courts throughout the United States, but especially in the Eleventh Circuit, are poised to invalidated countless content-neutral time, place, and manner regulations which were conscientiously enacted by local government officials in an attempt to provide for peace and order in public spaces. For example, since the Eleventh Circuit's decision in the *Gainesville* case, the City of Jacksonville, Florida and the City of Daytona Beach, Florida have each had content neutral regulations invalidated on the basis that local governments must comply with *Freedman* when enacting content-neutral time, place and manner regulations. *Florida Cannabis Action Network, Inc. v. City of Jacksonville*, Case No. 3:00cv544-J-20TJC (M.D. Fla. March 1, 2001), and *Red-Eyed Jack, Inc., v. City of Daytona Beach*, Case No. 6:01-cv-429-orl-28 KRS (M.D. Fla. July 24, 2001).

Were this Court to hold that such regulations, even though they be content-neutral time, place, and manner

regulations, are subject to prior restraint analysis and the requirements enumerated in *Freedman*, local governments would lose all ability to control public spaces. Local governments already suffer from too few resources, whether in terms of personnel or money. To require that before they may deny permits to gather for First Amendment activities, local governments must affirmatively go to court and must guarantee a prompt judicial decision on their denial of a permit, would be to insist on the impossible. As this Court noted, the expense of challenging content-neutral time, place and manner regulations which apply equally to all segments of society is a price to be borne by the citizens challenging the regulations. Society as a whole would suffer were it otherwise, both in terms of additional financial and resource burdens assumed by already overburdened local governments and in terms of an inability by society generally to freely enjoy public fora because those spaces would suddenly be wholly unregulated.

For example, many localities, especially larger urban localities, would be faced with competing requests for the use of public fora, and quite likely while one denial is being litigated, no matter how quickly, other requests for the same time and place would invariably be submitted. Local governments will then find themselves in the unenviable position of having multiple ongoing litigations in progress because they cannot simply say, "We're sorry, but that space is already in use for another purpose." This is true regardless of whether the space is a park previously committed to other activities (be they First Amendment or otherwise) or whether the space is a public street at rush hour on a Friday afternoon. Prior restraint analysis is simply unworkable in the context of content-neutral time, place and manner regulations which do

not allow for unfettered exercise of discretion by public officials. The analysis the Court has engaged in since the *Davis* case in 1897, and which the Court has repeatedly invoked in varying circumstances over the hundred years since then, does provide a workable standard, however: Content-neutral time, place, and manner regulations adequately protect all segments of society, as does requiring those challenging such regulations to bear the burden of going to court and awaiting a judicial decision.

CONCLUSION

For the foregoing reasons, the International Municipal Lawyers Association respectfully requests that this Court affirm the decision of the Seventh Circuit holding that content-neutral time, place, and manner regulations are not subject to prior restraint analysis or the requirements of *Freedman v. Maryland*, 380 U.S. 51 (1965).

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